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Regional Integration through
Dispute Settlement

The European Union Experience

Ellen Vos



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Regional Integration Through Dispute Settlement: The European Union Experience

Ellen Vos^{*}

Abstract:

Dispute settlement mechanisms have considerably advanced the European integration process. This paper aims to scrutinise the main legislative provisions and structure of the dispute settlement mechanisms in the European Union. It discusses the two different types of dispute settlement (judicial and alternative) as well as some mechanisms that have been designed to prevent disputes from arising. It is submitted that the current EU model of dispute settlement does not offer ideal solutions but could serve as a learning process for other integration processes such as the Andean Community and the recently created South American Community of Nations.

Keywords:

EU, dispute settlement, integration, Court of Justice, Andean Community

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1. Introduction

One of the vital components for the sustainability of the processes of regional integration is the legitimacy and effectiveness of the dispute settlement mechanisms.¹ This paper therefore aims to scrutinise the main legislative provisions and structure of the dispute settlement mechanisms in the European Union, which, contrary to the experience with the Andean Community, have considerably advanced the European integration process.

Within the European Union context, in particular the European Court of Justice (ECJ) has never grown tired of pushing towards more integration, to an 'ever closer union between the peoples of Europe'. By means of its pro-active attitude in addressing disputes, the ECJ is therefore generally considered to be of pivotal importance for the European integration process. As one author commented:

'European legal integration, provoked by the European Court of Justice ...and sustained by private litigants and national judges, has gradually but inexorably 'transformed' ... the European Community.'²

In its case law, the Court has not shied away from promoting a 'certain idea of Europe'.³ It is a commonly held that the ECJ has followed a vigorous policy of legal integration, in particular in the first decades of the Community's existence and that the Court has given flesh and substance to the 'framework' EC Treaty.⁴ The Court has so been very active in expanding Community competences and enhancing the effectiveness of Community law, whilst it also has actively promoted the integration of Community law into national legal systems.⁵ Already

¹ As was highlighted during the workshop 'Specific Aspects of the Experiences of the European Union and the Andean Community' which was held in Sao Paulo in October 2004.

² A. Stone Sweet, *The Judicial Construction of Europe* (OUP, Oxford 2004), 1.

³ P. Pescatore, 'The doctrine of direct effect: an infant disease of community law', (1983) 8 *EL Rev* 155-177, 157.

⁴ See P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials* (OUP, Oxford 2003), 87.

⁵ See for recent reviews e.g. G. de Búrca, 'The European Court of Justice and the Evolution of EU law', in: T. Börzel and R. Cichowski (eds.), *The State of the European Union, Law, Politics and Society* (OUP, Oxford 2003), 48-75; M. Dougan, *National Remedies before the Court of Justice*, (Hart Publishing, Oxford 2004); M. Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, Oxford 2005); G. De Búrca and J. H. H. Weiler (eds.), *The European Court of Justice* (OUP, Oxford 2001); A. Dashwood and A. Johnston (eds.), *The Future of the Judicial System of the European Union* (Hart Publishing, Oxford 2001); A. Arnall, *The European Union and its Court of Justice* (OUP, Oxford 1999); M. Maduro Póiares, *We the Court*

at very early infant stage of the Community, the Court inferred from the Treaty objectives and the text of the provisions, that the Community was an autonomous legal order and that Community law had supremacy over any incompatible national law.⁶ One year earlier, the Court had already articulated the concept of direct effect of Community law.⁷ Importantly, the ‘success-story’ of European integration can be partly attributed to this activist-attitude of the ECJ and its development of the principles of supremacy and direct effect.⁸ The importance attached to the Court in the study of Community law has made political scientists to comment that ‘legal scholars portray the Court as a hero who has greatly advanced the cause of integration’.⁹ Similarly, the ECJ has been depicted as the ‘European lawyer’s hobbyhorse’.¹⁰

The functioning of this system should nevertheless by no means be considered in isolation as only relatively few cases are actually dealt with by courts. It is general knowledge that these procedures are costly and lengthy. For example, where at times it is difficult to enforce EU legislation other than by means of court actions, producers have indicated that they prefer to adapt their market strategy to the different regulatory requirements of the Member States rather than enforcing their rights, based on the principle of mutual recognition,¹¹ through court proceedings.¹² The European institutions have therefore developed various instruments for the prevention and amicable settlement of problems.¹³ For example, as regards the problems producers may face with the import of their products in a Member State, an administrative network has been set up with the aim of solving problems that have arisen

(Hart Publishing, Oxford 1998), R. Dehousse, *The European Court of Justice* (Macmillan, Basingstoke 1998), H. Rasmussen, *The European Court of Justice*, (Gadjura, Copenhagen 1998), A. M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts* (Hart Publishing, Oxford 1998).

⁶ Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 614, Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1977] ECR 629.

⁷ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1962] ECR 1.

⁸ Discussion of the doctrine of direct effect and supremacy falls outside of the scope of this article. See for a discussion on this issue, e.g. Craig and de Búrca, *supra* note 4, Chapters 5 and 7. See also the article by E. Best in this volume.

⁹ K. Alter and S. Meunier-Aitsahalia, ‘Judicial politics in the European Community’, (1994) 26 *Comparative Political Studies*, 535-561, 535-6.

¹⁰ T. Koopmans, ‘The future of the Court of Justice of the European Communities’ (1991) 11 *YBEL*, 15.

¹¹ See about these problems, the 1999 Communication from the Commission to the European Parliament and the Council, COM(1999)299 final: ‘Mutual recognition in the context of the follow-up to the Action Plan for the Single Market’ and the Commission’s interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition, OJ 2003, C 265/2.

¹² See e.g. J. Pelkmans, L. Di Mauro, and E. Vos, ‘Reforming Product Regulation in the EU: a Painstaking, Iterative Two-level Game’, in: G. Galli and J. Pelkmans (eds.), *Regulatory Reform for the Better Functioning of Markets* (Edward Elgar, Northampton 2000), 238-291.

between a producer and a Member State.¹⁴ Moreover the institutions have developed various mechanisms to prevent disputes from arising.

For the purpose of this article, the manner in which the European Union deals with disputes is thus roughly divided in two: judicial dispute settlement and alternative dispute settlement. This contribution therefore discusses the two different types of dispute settlement (judicial and alternative) as well as some mechanisms that have been designed to prevent disputes from arising.

2 Judicial Dispute Settlement Mechanism: the European Court System

As set forth above, the ECJ is generally considered to be a key actor in the European integration process. In view of the variety of its tasks, the ECJ has been depicted in various manners. So it has been described as a ‘kangaroo’ court, where it acts in enforcement cases (Article 226 cases), as the ECJ has closely followed the opinion of the Commission.¹⁵ Moreover the ECJ is viewed as a ‘forum for inter-institutional debate’, where it has jurisdiction to review Community acts or inaction of the Community institutions, brought both by Member States and Community institutions (Articles 230 and 232 EC) and as a ‘regulatory complaint board’ where it can hear cases brought by individuals against Community acts or inaction of the institutions (Articles 230 and 232 EC). The ECJ acts as a constitutional court where it needs to guard the objectives and rules of law laid down in the Treaties and plays an essential role in preserving the balance between the Community and the Member States.¹⁶ The ECJ thus decides on the legality of Community secondary legislation, the preservation of the institutional balance, the demarcation of Community and national

¹³ See in the context of the free movement of goods, Report from the Commission to the Council, the European Parliament and the Economic and Social Committee - Second biennial Report on the Application of the Principle of Mutual Recognition in the Single Market, COM (2002) 419 final.

¹⁴ The so-called SOLVIT mechanism. See section 3.4.

¹⁵ Schepel and Blankenburg thus argue that the ECJ looks like the baby kangaroo in the pouch of the mother, as it has to follow wherever the Commission goes, H. Schepel and E. Blankenburg, ‘Mobilising the European Court of Justice’, in de Búrca and Weiler, *supra* note 5, 18.

¹⁶ See e.g. F. Jacobs, ‘Is the Court of Justice of the European Communities a Constitutional Court?’ in: D. Curtin and D. O’Keeffe (eds.), *Constitutional Adjudication in European Community and National Law* (Butterworths, Dublin 1992), 32 and J. Komárek, ‘Federal Elements in the Community Judicial System: Building Coherence in The Community Legal Order’, (2005) 42 *CML Rev.*, 9-34.

competence as well as the protection of fundamental rights. At the same time, the ECJ is sitting at the apex of the Community court system and as such needs to ensure the uniform application of Community law in the framework of a preliminary questions referred to it by national courts or upon appeal against a judgment of the Court of First Instance (CFI).

In view of its continuously growing case law, over the years there has been much debate about the reform of the EU judicial system. It was however only after the negotiations during the Intergovernmental Conference in Nice that plans for reform took more serious form, which found their way into the Nice Treaty. The most important issues of reform that have been inserted into the EC Treaty are the possibility to create a third layer of specialised judicial panels under the CFI and the ECJ and the possibility for the CFI to exercise also jurisdiction in preliminary rulings.

This section will thus analyse the European Union's court dispute settlement mechanism. First it will examine the composition of the different bodies and their jurisdiction and the operational rules that govern these institutions. Second it will discuss the actual operation of the European courts and reveal some of its major problems. In addition, it will address the amendments which the Treaty establishing a Constitution for Europe ('the Constitution') will introduce whenever it will enter into force. In conclusion, some of the challenges that the system will face in the future will be discussed.

2.1 Structure and Composition

The Community's judicial branch has four different bodies or layers. The EC Treaty provides that the ECJ and the CFI, each within its jurisdiction, shall ensure that in the interpretation and application of the EC Treaty the law is observed.¹⁷ Subsequent to the Nice Treaty, the EC Treaty now provides that judicial panels may be attached to the CFI in order to exercise, in certain specific areas, the judicial competence laid down in the EC Treaty.¹⁸ Very recently the first judicial panel has been set up. It must be underlined that properly understood, also

¹⁷ Article 220 EC Treaty.

¹⁸ The position of the ECJ is further regulated by the Statute of the ECJ ('the Statute'), which is adopted by the member states. The ECJ also has Rules of Procedure adopted by itself.

national courts are part of the Community's judicial system and can therefore be viewed as the fourth type of Community Court.

2.1.1 The European Court of Justice

The ECJ is not a single unitary actor but is composed of 25 judges¹⁹ and 8 Advocates-General.²⁰ The judges are appointed by common accord of the governments of the Member States and hold their offices for a renewable term of six years. They are chosen from legal experts whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are of recognised competence. Every three years, (alternatively thirteen or twelve) judges are partially replaced.²¹ In accordance with their respective traditions, some Member States have appointed academics as judges, whilst others have nominated existing national judges or practising advocates as judges of the ECJ. Currently, after a long period of only male presence, there are now also some female judges in both the ECJ and the CFI.

The Member States may not remove the judges. However, a judge may be dismissed if, in the unanimous opinion of the judges and advocates-general of the ECJ, he or she no longer fulfils the requisite conditions or meets the obligations arising from his or her office.²² Today, this provision has not been applied yet.²³

The judges are immune from legal proceedings. They may not hold any political or administrative office, and may only engage in any other occupation upon an exceptionally granted exemption.²⁴

The judges select the president of the Court from amongst themselves for a renewable term of three years after every partial replacement. Currently this is Mr Vassilios Skouris. The president directs the judicial business and the administration of the ECJ and he also presides

¹⁹ Article 221 EC Treaty.

²⁰ Article 222 EC Treaty.

²¹ Statute, Article 9.

²² Statute, Article 6.

²³ T. C. Hartley, *The Foundations of European Community Law* (OUP, Oxford 2003), 55.

²⁴ Article 223 EC Treaty and Statute, Articles 3-4.

at hearings and deliberations.²⁵ The ECJ may sit as a full Court, in a Grand Chamber (13 Judges) or in chambers of three or five Judges. The ECJ sits as a full Court in the very exceptional cases exhaustively provided for by the Treaty²⁶ and where it considers that a case is of exceptional importance. The quorum for the full Court is 15. It sits in a Grand Chamber when a Member State or a Community institution that is a party to the proceedings so requests, or in particularly complex or important cases. Other cases are heard by a chamber of three or five Judges. After electing the president, the Court forms chambers of three or five judges and the judges elect the presidents of the chambers also for three years.

Advocates-general are also elected to the ECJ for a term of six years. They must fulfil the same criteria for election as judges. They assist the ECJ in its task. They deliver -- in open court and with complete impartiality and independence -- opinions in all cases, save as otherwise decided by the Court where a case does not raise any new points of law.

Advocates-general work independently of the judges. They examine the facts of the case, and investigate the case law relevant to the solution of the dispute. They prepare an opinion on the case, in which they examine the facts of the case as well as the applicable Community law. Theirs is the first reading and legal assessment of the case, which may serve as a starting point or reference, which the sitting court on several occasions accepts. The opinions of Advocates-general however do not bind the judges when issuing the final judgment.

The ECJ appoints its registrar for a term of six years. The registrar is responsible for the operation of the registry, into which all pleadings and supporting documents are to be entered. The registrar is further responsible for the acceptance, transmission and custody of these documents. The registrar also acts as head of the administrative infrastructure of the ECJ, which includes, among others, a library and research and documentation service and a large translation and interpretation service, supporting the use of all the official languages of the Community in the course of the ECJ's work.

²⁵ Rules of Procedure, Article 8.

²⁶ For example, where it must compulsorily retire the European Ombudsman or a Member of the European Commission who has failed to fulfil his obligations.

2.1.2 The Court of First Instance

The creation of the CFI instituted a legal system based on two levels of jurisdiction: all cases heard at first instance by the CFI may be subject to appeal to the ECJ only on questions of law. The CFI is currently composed of 25 judges, one from each Member State. The judges are appointed for a renewable term of six years by common accord of the governments of the Member States.²⁷ Contrary to the ECJ, the CFI does not have separate advocates-general, although any judge may be called upon to act as Advocate General.

The CFI sits in chambers composed of three or five judges or, in certain cases, may be constituted by a single judge. It may also sit in a Grand Chamber or as a full court in particularly important cases. The CFI appoints its own registrar and lays down the rules applicable to its service. Further, the CFI establishes its Rules of Procedure in agreement with the ECJ.²⁸

2.1.3 Judicial Panels

After the Nice Treaty, judicial panels may be created to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it.²⁹

The members of the judicial panels shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office, therefore, the requirements are not as high as in the case of the European Courts. The judicial panels shall establish their Rules of Procedure in agreement with the ECJ.

Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the CFI.

²⁷ Article 224 EC Treaty.

²⁸ Ibid.

²⁹ Article 225a EC Treaty.

Further, unless the decision establishing the judicial panel provides otherwise, the provisions of the EC Treaty relating to the ECJ and the provisions of the Statute of the ECJ shall apply to the judicial panels. The first judicial panel that has been set up in 2004, is the Civil Service Tribunal.³⁰ This new specialised court will consist of seven judges.

2.2 Jurisdiction

2.2.1 The ECJ and CFI: Mandate

The ECJ and the CFI have duties under both the EC Treaty and the EU Treaty.³¹ Under the EC Treaty, they have to ensure that the law is observed in the interpretation and application of the Treaty.³² Their jurisdiction can be split up into hearing direct actions and preliminary rulings. In addition, the ECJ may also give opinions on, for example, the compatibility of international agreements to be concluded by the Community. Such opinions are advisory, but, nevertheless, have the legal effect that in case of a negative opinion certain amendments may be necessary to accommodate it.³³ Whilst before the Treaty of Nice the jurisdiction of the two courts was determined according to the capacity of the applicant (institution, Member States or individuals), due to the caseload it has been decided after the Nice Treaty to allow more cases to be dealt with by the CFI, and a division has been made according to the subject-matter of the disputes concerned.³⁴ As a result of the new division of direct actions between the Court of Justice and the Court of First Instance, which came into effect on 1 June 2004, the CFI has acquired jurisdiction over direct actions for annulment and for failure to act brought by the Member States against:

- acts of the Commission with the exception of those that concern enhanced cooperation under the EC Treaty;
- decisions of the Council concerning State aid;

³⁰ Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal, OJ 2004 L 333/7.

³¹ This distinction will be abolished by the entry into force of the Constitution.

³² Article 220 EC Treaty.

³³ Hartley, *supra* note 23, 62.

³⁴ Decision 2004/407/EC, Euratom amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132/5, corrigendum at OJ 2004 L 194/3).

- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade;
- acts of the Council by which it directly exercises implementing powers;
- acts of the European Central Bank.

The cases transferred to the CFI on this basis may be estimated quantitatively at approximately 5% of the cases before the Court of Justice.³⁵ Hence, presently the CFI is competent to review acts on agriculture, state aid, competition, commercial policy, regional policy, social policy, institutional law, trade mark law, transport and staff regulations (until the Panel is set in place). The Nice Treaty allows also for the Council to transfer jurisdiction of preliminary ruling to the CFI.³⁶ Some have welcomed this possibility,³⁷ whilst others have received it with some concern.³⁸

A. Direct Actions

Direct actions start at the European Courts and, accordingly, will end there as well.³⁹ Consequently, in case of the ECJ, there is no possibility for an appeal or any other kind of judicial remedy against its final and binding decision.⁴⁰ Direct actions may include the following cases:

i) Failure to fulfil obligations – infringement or enforcement procedures

The ECJ is assigned competence to judge whether a Member State has failed to fulfil its obligations under Community law, brought by the European Commission. The power of the Commission to bring Member States before the court results from its ‘watchdog’ task, where it needs to ensure the proper application of the Treaty provisions and Community measures.⁴¹

³⁵ Annual report of the Court of Justice 2004, Luxembourg 2005.

³⁶ Article 225 (3) EC Treaty.

³⁷ J. H. H. Weiler, ‘Epilogue: The Judicial Apres-Nice’, in: de Búrca and Weiler (eds.), supra note 5, 215-226.

³⁸ See K. Lenaerts, ‘The role of the Court Of Justice, Court Of First Instance and Judicial Panels in the long term’ at the CCBE – Colloquium on the Judicial Architecture of the European Union, see http://www.ccbe.org/colloquium_nov_2004/documents/1_s_lenaerts.doc

³⁹ Hartley, supra note 23, 63.

⁴⁰ See however the situation which will occur when the EU will adhere to the ECHR which is to occur when the Constitution will enter into force.

⁴¹ Article 211 EC Treaty, first indent.

Most enforcement proceedings concern the complaint by the Commission that Member States have failed to implement directives in time or correctly or have not implemented directives at all. This may also explain the development of the doctrine of direct effect by the ECJ as it reacts to the problem on non-implementation of directives at the national level.⁴²

The nature of the enforcement procedure is mixed. In part, it functions as a diplomatic means for friendly dispute settlement. As Snyder underlined:

‘the main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless a minor part, of this process’.⁴³

The enforcement procedure also functions as a channel for individuals to complain to the Commission that Member States have infringed Community law, whilst it provides also for an ‘objective’ law enforcement tool by the Commission.⁴⁴ The procedure can be divided into four phases:⁴⁵ a pre-contentious phase, an administrative phase in which the Commission formally notifies the Member State of the alleged infringement by means of a letter (letter of formal notice), followed by a reasoned opinion by the Commission, with as a final phase: litigation before the Court. It must be emphasised that the Commission is by no means obliged to bring a case before the Court. For political reasons it may consider it wise not to bring a specific Member State before the court. In addition, another Member State may also bring the matter before the ECJ.⁴⁶

If the Court finds that an obligation has not been fulfilled, the Member State must take the measures necessary to comply with the Court’s judgment that declares that their legislation is in breach of Community law. As over the years Member States continued to fail to comply with the judgments, the Treaty of Amsterdam inserted the possibility in the EC Treaty of a pecuniary penalty. This entails that if a Member State does not comply with the Court’s judgment, the ECJ may, upon the request of the Commission, impose a lump sum or penalty payment on the Member State concerned.⁴⁷ After a slow start, the Commission now takes more seriously the possibility to bring a Member State before the ECJ for not having

⁴² See S. Prechal, *Directives in EC Law* (OUP, Oxford 2005).

⁴³ F. Snyder, ‘The Effectiveness of European Community law’, (1993) 56 *Modern Law Review*, 19-54, 30.

⁴⁴ Craig and de Búrca, *supra* note 4, 398-399.

⁴⁵ Article 226 EC Treaty.

⁴⁶ Article 227 EC Treaty.

complied with an earlier judgment of the ECJ. Several proceedings were thus initiated, but to date only two judgments have been handed down by the ECJ, imposing a pecuniary penalty of 20,000 euros daily on Greece and 624,150 euros on Spain for non-compliance.⁴⁸ Other cases have been withdrawn or are still pending.⁴⁹

ii) Action for annulment

In an action for annulment, the applicant requests judicial review of a measure adopted by a Community institution (regulations, directives, and decisions). A Member State, the Community institutions or individuals to whom the measure contested is addressed or which is of direct and individual concern to them may bring an action for annulment before the European Courts.⁵⁰ If the action is well founded, the European Courts will declare the act concerned to be void.⁵¹

iii) Failure to act

The European Courts may also review the legality of a failure to act by a Community institution. However, the action is admissible only if the institution concerned has first been called upon to act. The institution or institutions whose failure to act has been declared infringing, will be required to take the necessary measures to comply with the judgment of the European Courts. However, this procedure is without prejudice to the non-contractual liability of the Community⁵² (see point iv).

iv) Non-contractual liability

As a principle, in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.⁵³ In applications

⁴⁷ Article 228 EC Treaty.

⁴⁸ Case C-387/97 *Commission of the European Communities v Hellenic Republic* [2000] ECR I-5047, concerning the disposal of toxic waste and C-278/01 *Commission of the European Communities v Kingdom of Spain*, not yet reported, concerning the quality of bathing water.

⁴⁹ Case C-304/02 *Commission of the European Communities v French Republic*, pending.

⁵⁰ Article 230 EC Treaty.

⁵¹ Article 231 EC Treaty.

⁵² Articles 232 and 233 EC Treaty.

⁵³ Article 288 (2) EC Treaty.

for compensation for damages, based on non-contractual liability, the European Courts rule on the liability of the Community for damage caused to citizens and to undertakings by the above.⁵⁴

v) Appeals on points of law

Appeals on points of law only may be brought before the ECJ against judgments given by the CFI. If the appeal is admissible and well founded, the ECJ sets aside the judgment of the CFI. Where the state of the proceedings so permits, the Court may itself decide the case. Otherwise, the Court must refer the case back to the CFI, which is bound by the decision given on appeal.

vi) Staff cases

The CFI has jurisdiction to hear staff cases, these are disputes between the Community and its officials and other servants. With the creation of the Civil Judicial Panel, these cases will be dealt with by the Panel.

vii) Arbitration clauses

The European Courts have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law.⁵⁵

viii) Special agreements

The ECJ also has jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties.⁵⁶

⁵⁴ Article 235 EC Treaty.

⁵⁵ Article 238 EC Treaty.

⁵⁶ Article 239 EC Treaty.

B. Preliminary References

The preliminary reference procedure, laid down in Article 234 of the EC Treaty is one of the most original characteristics of the Community system. It has been referred to as the ‘jewel in the Crown’ of the ECJ’s jurisdiction,⁵⁷ and as ‘one of the most remarkable and successful dimensions of the European legal order and European constitutionalism’.⁵⁸ The ECJ appears to have been the first international court that has been given a jurisdiction of this kind, after which also the Benelux Court, the Andean Court of Justice and the EFTA Court have been granted a similar jurisdiction, the last having jurisdiction only to give advisory opinions.⁵⁹ The preliminary reference procedure gives expression to the multi-level character of the European integration system. Hence, while the European courts are, pursuant to the EC Treaty, conferred upon the task to ensure that the law is observed (see above), they are not the only judicial bodies within the European judicial system. National courts too form an integral part of the judicial architecture. They are also obliged to apply Community law, inasmuch as they retain jurisdiction to review the administrative implementation of Community law, for which the authorities of the Member States are essentially responsible. National courts are thus by their nature the first ‘guarantors’ of Community law.

The preliminary ruling system has three functions: 1) it is to ensure a uniform application of Community law, 2) it is to facilitate the application of Community law by offering national courts a helping hand in resolving problems which may result from the application of Community law and 3) it is a means to protect the rights of citizens. Prior to the Nice Treaty, only the ECJ was granted the power to give preliminary rulings. Article 225 (3) of the EC Treaty now gives the Court of First Instance jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 in specific areas laid down by the Statute of the Court of Justice. Whenever the CFI considers that a case raises issues of principle that may affect the unity or consistency of EC law, it may refer the case to the ECJ. The decision by the CFI may exceptionally be reviewed by the ECJ, in cases where there is a serious risk that the unity or consistency of EC law will be affected. It must be stressed that the reference procedure sees to the relation between the national and European courts. Individuals do not have a right of appeal to the ECJ.

⁵⁷ Craig and de Búrca, *supra* note 4, 432.

⁵⁸ Weiler, *supra* note 37, 219.

⁵⁹ Hartley, *supra* note 23, 269.

Article 234 reads as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

It follows that the ECJ has jurisdiction to give preliminary rulings concerning: (i) the interpretation of the EC Treaty; (ii) the validity and interpretation of acts of the institutions of the Community and of the ECB; and (iii) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.⁶⁰ Questions of fact and of national law may not be referred. The courts are also not allowed to apply the law to a particular case, although it is often admittedly difficult to define the exact borderline between interpretation and application.

To ensure the effective and uniform application of Community legislation and to prevent divergent interpretations, national courts may, where the interpretation of Community law is concerned, refer questions to the ECJ. However, national courts acting at the last instance must refer to the ECJ in the above case. They are exempted from this obligation in three cases: *i*) whenever they decide that the question is not relevant to solve the dispute at stake, *ii*) whenever they find that the question has already been resolved in a similar case or that it is consistent case law (*acte éclairé*) or *iii*) that the provision in question is ‘clear’ and that it does not require any interpretation (*acte clair*). The first case concerns situations where the national court is of the opinion that the case before it, although *prima facie* would concern

⁶⁰ Article 234 EC Treaty.

Community law, can be solved without a reference to that. This is so because Community law in no way affects the outcome of the case. The second case can be considered as more complex and has given rise to certain debates.⁶¹ The preliminary ruling system originally was described as horizontal and bilateral. However, by stating that national courts were under no further obligation to refer a question on Community law to the ECJ where ‘previous decisions of the Court have already dealt with the point of law in question’,⁶² the ECJ has clearly transformed this relationship into a vertical and multilateral one.⁶³ Therefore, national courts no longer have to immediately refer a question on the interpretation of Community law to the European courts; rather, first they have to check whether there is a decision on the point of law in question. The last case deals with situations where the interpretation of Community law raises no doubts as to its proper meaning. However, the ECJ gives a caveat in this regard:

‘the existence of such a possibility must be assessed on the basis of the characteristic feature of Community law and the particular difficulties to which its interpretation gives rise’.⁶⁴

Such characteristics and features may include the fact that Community law is drafted in several languages, has a specific terminology, and that it should be interpreted in a teleological way.

Hence, as opposed to direct actions, preliminary reference procedures form a part of a national court’s procedure. The main dispute starts before a national court and, after obtaining the answers to the question(s) submitted for a preliminary ruling, the national court will rule on the merits of the case.

The ECJ’s ruling is binding on the national court which referred the preliminary question. If the same issue arises again in a later case, the national court may apply the ruling again but it is not precluded from making a new reference. It is generally considered that not only the referring court but all courts are bound by the ruling unless it is overruled in a later judgment. The national courts should then either apply the ruling or make a new reference.⁶⁵

⁶¹ For an overview, see Craig and de Búrca, *supra* note 4, 447.

⁶² Case 238/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, para 14.

⁶³ Craig and de Búrca, *supra* note 4, 479.

⁶⁴ Case 238/81, *supra* note 62, para 17.

⁶⁵ Hartley, *supra* note 23, 303.

According to the division of tasks between the national court and the ECJ, it is for the former to determine the facts underlying the basic dispute and so to indicate the applicable rules of law and to assess the relevance of the questions which it refers to the Court. And, after the ECJ has answered the question, it is again for the national court to apply Community law in the way it was interpreted in the case before it.

In addition, the preliminary ruling procedure may also be used for another purpose, i.e. to contest the legality of EC measures. In that regard one should bear in mind that in the case of direct review of legality, the ECJ has narrowly defined the criteria for standing.⁶⁶ Therefore, referring a question to ECJ may be seen as an alternative way of judicial review. Regulations, as measures having a general application, can be challenged this way. The ECJ held that the legality of decisions can also be reviewed via Article 234 EC, without having assessed whether the parties in the main proceedings could have brought a direct action.⁶⁷ In its subsequent case law the ECJ restricted this very generous interpretation and held that an action before the national courts is not admissible once the time-limits for a direct action under Article 230 EC have expired.⁶⁸

The EC Treaty also provides for a more restraint preliminary ruling procedure in cases of visas, asylum, immigration and other policies on the free movement of persons. First, only national courts of last instance have to refer a question, if they consider that a decision on the question is necessary to enable them to give judgment.⁶⁹ Moreover, the ECJ's jurisdiction is limited as certain measures relating to the maintenance of law and order and the safeguarding of internal security are excluded from the scope of giving a ruling.⁷⁰ Finally, the Council, the Commission or a Member State may also request the ECJ to give a ruling on a question of interpretation of the relevant Treaty provisions (Title IV) or of acts of the institutions of the Community based therein. In such a case, the ruling given by the ECJ will not apply to judgments of national courts which have already become *res judicata*.⁷¹

⁶⁶ See section 2.4.4.

⁶⁷ Cases 133-136/85 *Walter Rau Lebensmittelwerke and others v Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2289.

⁶⁸ Case C-188/92 *Textilwerke Degendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833.

⁶⁹ Article 68 (1) EC Treaty.

⁷⁰ Article 68 (2) EC Treaty.

⁷¹ Article 68 (3) EC Treaty.

The preliminary ruling system can be considered as a mechanism through which national courts and the ECJ engage in a discourse on the interpretation and application of Community law, when it is in conflict with national rules. Although Article 234 EC was originally intended to establish a horizontal and bilateral relationship, over the years it has developed more into establishing a vertical and multilateral relationship. It can thus be said that the European courts sit at the apex of the Community-wide judicial hierarchy.⁷² There are, however, serious disadvantages of the preliminary ruling system. First of all, the action is dependant on whether the national court actually refers the question to the ECJ. Further, the case will go to at least two judicial bodies instead of one. Finally, the party wishing to challenge the Community measure this way may have difficulties in finding an actual defendant.⁷³

C. Jurisdiction under the Second and Third Pillar of the EU

Under the second pillar, that is Common Foreign and Security Policy, the European Courts have no jurisdiction whatsoever. On the other hand, the ECJ also has jurisdiction in certain cases under the so-called third pillar of the EU Treaty, Police and Judicial Co-operation in Criminal Matters.

The ECJ has jurisdiction, subject to certain conditions, to give preliminary rulings

- (i) on the validity and interpretation of framework decisions and decisions;
- (ii) on the interpretation of conventions established; and
- (iii) on the validity and interpretation of the measures implementing them.

However, in these cases Member States have to expressly accept the jurisdiction of the ECJ to give preliminary rulings.⁷⁴ However, the ECJ does not have jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.⁷⁵

⁷² Craig and de Búrca, *supra* note 4, 433 and following.

⁷³ Craig and de Búrca, *supra* note 4, 531.

⁷⁴ Article 35 (1) EU Treaty.

⁷⁵ Article 35 (5) EU Treaty.

The ECJ, on the other hand, has jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. There is a two-month deadline for such a challenge.⁷⁶

Further, the ECJ has jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted, whenever such a dispute cannot be settled by the Council within six months.⁷⁷ Finally, the ECJ also has jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions.⁷⁸

2.2.2 Judicial Panels

As pointed out above, so far only one judicial panel has been established, the European Civil Service Tribunal.⁷⁹ Its jurisdiction will cover disputes between the European Union and its civil service, a jurisdiction currently exercised by the CFI. Its decisions will be subject to appeal on questions of law only to the CFI and, in exceptional cases, to review by the ECJ.

The creation of the European Civil Service Tribunal, which should be able to take up its functions during 2005, is an important step in the implementation of the reforms of the judicial system provided for by the Treaty of Nice. It will enable the length of cases to be reduced and their conduct to be improved not only for cases concerning the European Civil Service, but for all the proceedings with which the CFI has to deal.⁸⁰

It is expected that the creation of the European Civil Servant Tribunal will imply a transfer of between 25 to 30 % of the cases currently brought before the CFI.⁸¹ This transfer of cases will

⁷⁶ Article 35 (6) EU Treaty.

⁷⁷ Article 35 (7) EU Treaty.

⁷⁸ under Article 34(2)(d) EU Treaty.

⁷⁹ Council Decision 2004/752/EC of 2 November 2004 establishing the European Union Civil Service Tribunal, OJ 2004 L 333/7.

⁸⁰ Press Release No. 88/04 on 2 November 2004.

⁸¹ In 2003, 124 new staff cases were brought before the CFI.

be able to compensate for the increase in caseload due to the transfer of direct actions also to the CFI as of 1 June 2004. Currently also the creation of a Court for the Community Patent is under discussion. This is expected to substantially alleviate the workload of the CFI. K. Lenaerts views that the creation of such a panel seems to be unavoidable if in the future a more substantial transfer of cases from the Court of Justice to the CFI were to be envisaged.⁸²

2.3 The Court System in Action

2.3.1 Procedure

The procedure before the ECJ consists of two parts: written and oral.⁸³ However, certain aspects of the procedures in direct actions and preliminary rulings differ, which are discussed in turn below.

Procedures in direct actions start by a written application addressed and sent to the registry. As soon as it is received, the application is entered in the register. The registrar publishes a notice of the action and of the applicant's claims in the Official Journal. A judge-rapporteur and an Advocate General are then appointed. However, the ECJ may decide that the case will be determined without an opinion if the case raises no new point of law.⁸⁴ The registrar sends the plea to the defendant, who has one month to lodge a defence. After that, the applicant may submit a reply and the defendant a rejoinder, within one month in each case. The president of the ECJ may specifically authorise an extension of the above mentioned deadlines.

As a preliminary objection, the defendant may argue that the action is inadmissible (e.g. the plaintiff has no standing, i.e. was not entitled to file an action, a time limit has not been observed, etc.). This submission is made in a separate document, to which the plaintiff may reply. Then the ECJ has to decide on this objection; it may uphold (and end the procedure) or dismiss it (continue).⁸⁵

⁸² See Lenaerts, *supra* note 38.

⁸³ Statute, Article 20.

⁸⁴ *Ibid.*

⁸⁵ Hartley, *supra* note 23, 66.

The ECJ decides, upon reading the preliminary report of the judge-rapporteur and hearing the views of the Advocate General, whether any preparatory inquiry is necessary and to what body the case should be assigned. In case of a preparatory enquiry, the ECJ will prescribe the measures it considers necessary (e.g. personal appearance of the parties, oral testimony, an inspection of the place or thing in question).⁸⁶ Further, it may also summon and examine witnesses and experts either on its own motion or after an application of a party.⁸⁷

Once the written procedure is completed, the next step is the public hearing on the date set by the president of the ECJ. However, if none of the parties indicated reasons for to be heard, the ECJ may decide otherwise.⁸⁸ In a Report for the Hearing, the judge-rapporteur summarises the facts alleged and the arguments of the parties and the interveners, if any. The report is made public in the language of the case at the hearing. At the hearing, the parties argue the case before the judges and the Advocate General (unless the case is decided without an opinion by the Advocate General). The judges and the Advocate General may ask any questions from the parties. However, the parties may only address the ECJ through their legal representatives.⁸⁹ After the hearing, the Advocate General delivers his or her opinion orally in open court. This ends the oral stage of the procedure.

Next, the judge-rapporteur prepares a draft judgment, which is circulated among the judges. Each of the judges may propose changes. The judges deliberate in closed session,⁹⁰ and the deliberations are to remain secret.⁹¹ The ECJ delivers its judgment in open court.

Procedures for a preliminary ruling start when the national court submits its question(s) to the ECJ concerning the interpretation or validity of a provision of Community law, generally in the form of a judicial decision in accordance with national procedural rules. The decision of a national court to refer a question for a preliminary ruling is communicated to the Member States in the original as well as in a translated version.⁹²

⁸⁶ Rules of Procedure, Article 46.

⁸⁷ Rules of Procedure, Article 47.

⁸⁸ Rules of Procedure, Article 44a.

⁸⁹ Rules of Procedure, Article 58.

⁹⁰ Rules of Procedure, Article 64.

⁹¹ Statute, Article 35.

⁹² Rules of Procedure, Article 104 (1).

The parties, the Member States and the Community institutions may submit written observations to the ECJ. The remainder of the procedure is identical to that in direct actions. All those entitled to submit written observations may also present their arguments orally at the hearing, if a hearing is held.

When the Advocate General has delivered his or her opinion, the ECJ may request clarification from the national court. After the judges have deliberated, the judgment is delivered in open court and sent by the Registrar to the national court, the Member States and the institutions concerned.

In cases where a preliminary ruling has been issued by the ECJ, the parties in the main proceedings may not request a revision or interpretation of that judgment, however, if new issues have arisen or if questions arise regarding to the application of the preliminary ruling the national court may refer again to the ECJ.⁹³

Table 1. Summary of procedure before the ECJ

Source: The ECJ

Written procedure	
Direct actions and appeals - Written application - Service of the application on the defendant - Publication of the application in the Official Journal - Defence - Reply - Rejoinder	References for a preliminary ruling - Order or judgment of the national court - Translation of the request for a preliminary ruling into all the Community languages and notification to the parties, the Member States and the Community institutions - Publication of the request for a preliminary ruling in the Official Journal - Written observations of the parties, the Member States and the Community institutions

⁹³ Hartley, *supra* note 23, 70.

Oral procedure
<ul style="list-style-type: none"> - (Hearing) - (Opinion of the Advocate General) - Deliberation of the Court - Judgment

2.3.3 Activities

The 2004 annual report of the Court of Justice reports the following statistics.⁹⁴

A. ECJ

It is interesting to note that for the first time in the history of the ECJ, in 2004 we may observe a decrease in the backlog of judicial activities of the ECJ. The ECJ explains this from the cumulative effect of the measures taken to improve the efficiency of the methods of work of the Court, the implementation of the changes made by the Treaty of Nice to the working of the Court, and the arrival of 10 new judges following enlargement is clearly visible in the Court's judicial statistics for 2004.⁹⁵ The number of cases brought to a close in 2004 increased by approximately 30%, that of cases pending fell by about 14%, and there was a considerable improvement in the duration of proceedings before the ECJ. In 2004, the ECJ thus brought 603 cases to a close (net figure, taking account of joined cases). Of those, 375 were dealt with by judgments and 226 gave rise to orders. Those figures show a considerable increase over the previous year (455 cases brought to a close). The Court had 531 new cases brought before it (561 in 2003, gross figures). There were 840 cases (gross figure) pending at the end of 2004, compared with 974 at the end of 2003 (see Figure 1).

The upward trend in the length of proceedings observed during previous years changed in 2004 (see Figure 3). As regards references for preliminary rulings, the length was approximately 23 months, whereas it was approximately 25 months in 2003. As regards direct

⁹⁴ Cited from the 2004 Annual Report, *supra* note 35.

⁹⁵ 2004 Annual Report, *supra* note 35, 12.

actions, it fell from 25 months in 2003 to 20 months in 2004. The average time taken to deal with appeals was 21 months (compared with 28 months in 2003). In 2004 the ECJ made differing degrees of use of the various instruments at its disposal to expedite its treatment of certain cases (priority treatment, the accelerated or expedited procedure,⁹⁶ the simplified procedure and the possibility of giving judgment without an Opinion of the Advocate General⁹⁷).

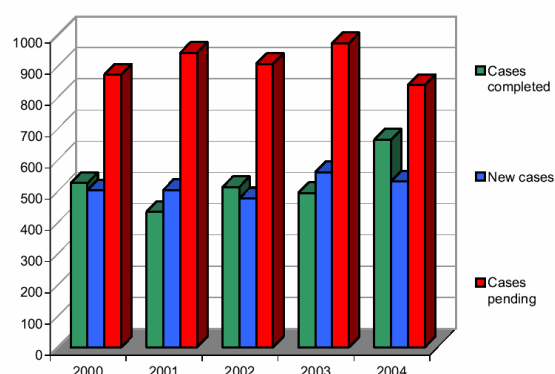
As regards the distribution of cases between the full ECJ (in all its formations) and Chambers of judges, the former disposed of almost 12% of the cases brought to a close in 2004, while Chambers of five judges and Chambers of three judges disposed of 54% and 34% of the cases respectively. There is a tendency for cases heard by Chambers of five judges to increase in number (50% of cases brought to a close in 2002). Five-judge Chambers are thus becoming the usual formation for hearing the cases brought before the Court. The substantial increase in the number of cases heard by Chambers of three judges should also be pointed out (20% of cases brought to a close in 2003).

⁹⁶ In 2004 the Court made use for the third time of the expedited or accelerated procedure provided for in Articles 62a and 104a of the Rules of Procedure, but this time in a direct action (judgment of 13 July 2004 in Case C-27/04P *Commission of the European Communities v Council of the European Union*, not yet published). As this instrument makes it possible to omit certain stages in the procedure, it was possible to give judgment less than six months from the case being brought.

⁹⁷ The Court also regularly used the simplified procedure provided for in Article 104(3) of the Rules of Procedure for answering certain questions referred to it for preliminary rulings. It made 22 orders on the basis of that provision.

Figure 1. Cases completed, new cases and cases pending 1999-2004

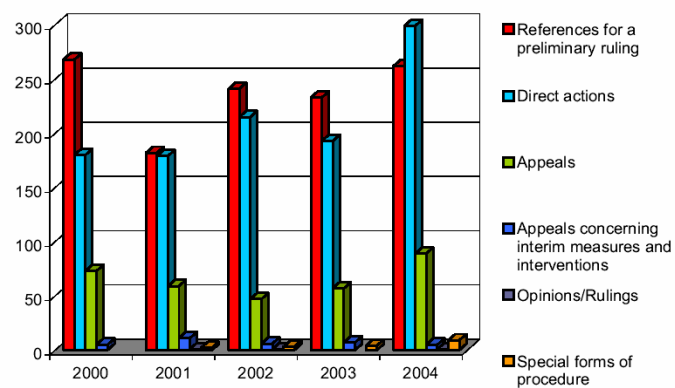
Source: Annual report ECJ 2004



	2000	2001	2002	2003	2004
Cases completed	526	434	513	494	665
New cases	503	504	477	561	531
Cases pending	873	943	907	974	840

Figure 2. Nature of proceedings of cases completed 1999-2004

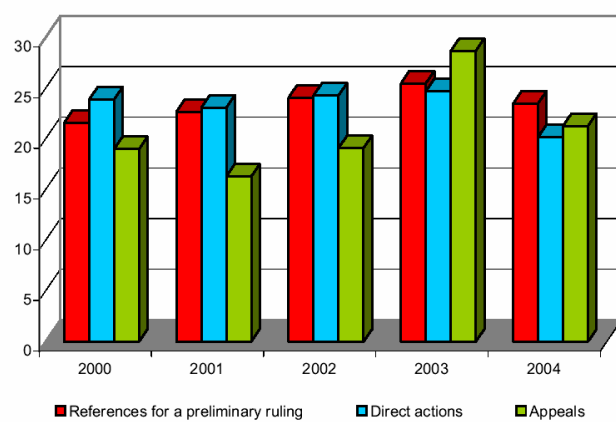
Source: Annual report ECJ 2004



	2000	2001	2002	2003	2004
References for a preliminary ruling	268	182	241	233	262
Direct actions	180	179	215	193	299
Appeals	73	59	47	57	89
Appeals concerning interim measures and interventions	5	11	6	7	5
Opinions/Rulings		1	1		1
Special forms of procedure		2	3	4	9
Total	526	434	513	494	665

Figure 3. Duration of completed cases 1999-2004 (expressed in months)

Source: Annual report ECJ 2004



	2000	2001	2002	2003	2004
References for a preliminary ruling	21,6	22,7	24,1	25,5	23,5
Direct actions	23,9	23,1	24,3	24,7	20,2
Appeals	19	16,3	19,1	28,7	21,3

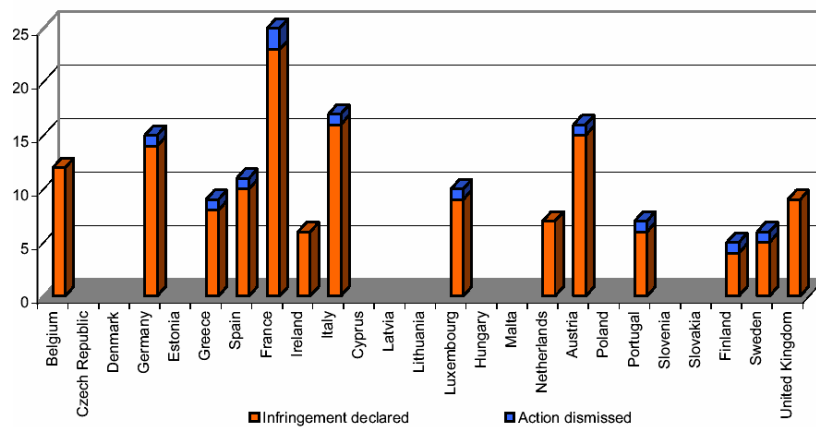
Figure 4. Subject-matter of the cases completed in 2004

Source: Annual report ECJ 2004

	Judgments/ Opinions	Orders ²	Total
Accession of new States		2	2
Agriculture	52	8	60
Approximation of laws	31	2	33
Area of freedom, security and justice		2	2
Association of the Overseas Countries and Territories		1	1
Brussels Convention	7		7
Commun Customs Tariff	3	1	4
Company law	14	2	16
Competition	22	7	29
Customs union	12		12
Economic and monetary policy	2		2
Energy	1		1
Environment and consumers	60	7	67
European citizenship	1		1
External relations	6	3	9
Fisheries policy	5	1	6
Free movement of capital	4		4
Free movement of goods	17		17
Freedom of establishment	11	3	14
Freedom of movement for persons	15	2	17
Freedom to provide services	13	10	23
Industrial policy	11		11
Intellectual property	15	5	20
Law governing the institutions	9	4	13
Principles of Community law	3	1	4
Social policy	41	3	44
Social security for migrant workers	6		6
State aid	17	4	21
Taxation	26	2	28
Transport	11		11
EC Treaty	415	70	485
CS Treaty	1		1
EA Treaty	2		2
Privileges and immunities		1	1
Procedure		8	8
Staff Regulations	5	7	12
Others	5	16	21
OVERALL TOTAL	423	86	509

Figure 5. Judgments concerning the failure of Member States failure to fulfil their obligations, outcome 2004

Source: Annual report ECJ 2004



	Infringement declared	Action dismissed	Total
Belgium	12		12
Czech Republic			
Denmark			
Germany	14	1	15
Estonia			
Greece	8	1	9
Spain	10	1	11
France	23	2	25
Ireland	6		6
Italy	16	1	17
Cyprus			
Latvia			
Lithuania			
Luxembourg	9	1	10
Hungary			
Malta			
Netherlands	7		7
Austria	15	1	16
Poland			
Portugal	6	1	7
Slovenia			
Slovakia			
Finland	4	1	5
Sweden	5	1	6
United Kingdom	9		9
Total	144	11	155

Figure 6. General trend in the activities of the Court (1952-2004)

Source: Annual report ECJ 2004

Year	New cases ¹					Applications for interim measures	Judgments ²
	Direct actions ³	References for a preliminary ruling	Appeals	Appeals concerning interim measures and interventions	Total		
1953	4				4		
1954	10				10		2
1955	9				9	2	4
1956	11				11	2	6
1957	19				19	2	4
1958	43				43		10
1959	47				47	5	13
1960	23				23	2	18
1961	25	1			26	1	11
1962	30	5			35	2	20
1963	99	6			105	7	17
1964	49	6			55	4	31
1965	55	7			62	4	52
1966	30	1			31	2	24
1967	14	23			37		24
1968	24	9			33	1	27
1969	60	17			77	2	30
1970	47	32			79		64
1971	59	37			96	1	60
1972	42	40			82	2	61
1973	131	61			192	6	80
1974	63	39			102	8	63
1975	62	69			131	5	78
1976	52	75			127	6	88
1977	74	84			158	6	100
1978	147	123			270	7	97
1979	1218	106			1324	6	138
1980	180	99			279	14	132
1981	214	108			322	17	128
1982	217	129			346	16	185
1983	199	98			297	11	151
1984	183	129			312	17	165
1985	294	139			433	23	211
1986	238	91			329	23	174
1987	251	144			395	21	208
1988	193	179			372	17	238
1989	244	139			383	19	188
1990 ⁴	221	141	15	1	378	12	193
1991	142	186	13	1	342	9	204
1992	253	162	24	1	440	5	210

1993	265	204	17		486	13	203
1994	128	203	12	1	344	4	188
1995	109	251	46	2	408	3	172
1996	132	256	25	3	416	4	193
1997	169	239	30	5	443	1	242
1998	147	264	66	4	481	2	254
1999	214	255	68	4	541	4	235
2000	199	224	66	13	502	4	273
2001	187	237	72	7	503	6	244
2002	204	216	46	4	470	1	269
2003	278	210	63	5	556	7	308
2004	220	249	52	6	527	3	375
Total	7528	5293	615	57	13493	339	6465

¹ Gross figures; special forms of procedure are not included.

² Net figures.

³ Including opinions of the Court.

⁴ Since 1990 staff cases have been brought before the Court of First Instance.

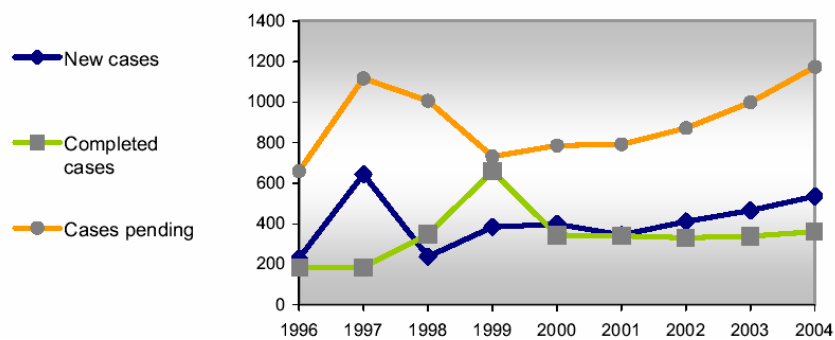
B. CFI

The number of cases brought before the CFI continued to increase in 2004 (536 compared with 466 in 2003, see Figure 7). This increase is partly due to the transfer of cases from the ECJ to the CFI. On this basis 48 additional cases were received, namely 21 cases whose referral was ordered by the ECJ and 27 new cases lodged by Member States. The increase in the number of cases brought may be observed in every field of litigation. In percentage terms, proceedings falling within two specific areas, namely staff cases and intellectual property cases, account for 48% of the proceedings brought before the Court. The number of cases decided, which comes to 361, is close to that of 2003 (339). The number of cases pending crossed the critical threshold of 1,000 cases, there being 1,174 such cases as at 31 December 2004. This number of cases corresponds, as things stand, to more than three years of the Court's work. The average duration of proceedings increased slightly compared with the preceding three years: in 2004 the average duration was 22.6 months for cases other than those falling within the special areas constituted by intellectual property cases and staff cases (see Figure 10).

Figure 7. Cases completed, new cases and cases pending 1995-2004[#]

Source: Annual report ECJ 2004

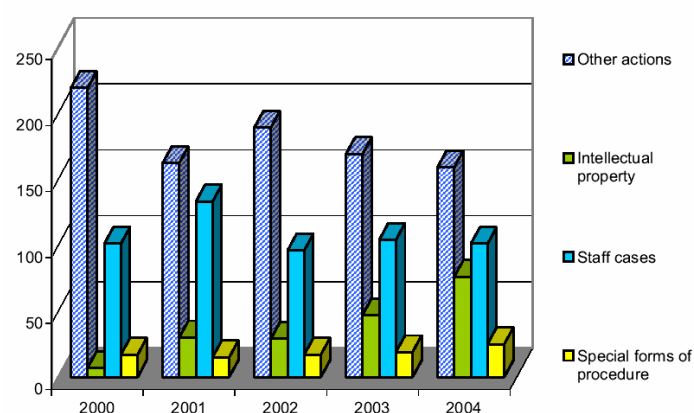
	1996	1997	1998	1999	2000	2001	2002	2003	2004
New cases	229	644	238	384	398	345	411	466	536
Completed cases	186	186	348	659	344	340	331	339	361
Cases pending	659	1117	1007	732	786	792	872	999	1174



the figures include certain groups of identical or related cases (cases concerning milk quotas, customs agents, State aid in the Netherlands for service-stations and State aid in the region of Venice, the restructuring of the fisheries sector, and staff cases).

Figure 8. Nature of proceedings of cases completed 1999-2004

Source: Annual report ECJ 2004



	2000	2001	2002	2003	2004
Other actions	219	162	189	169	159
Intellectual property	7	30	29	47	76
Staff cases	101	133	96	104	101
Special forms of procedure	17	15	17	19	25
Total	344	340	331	339	361

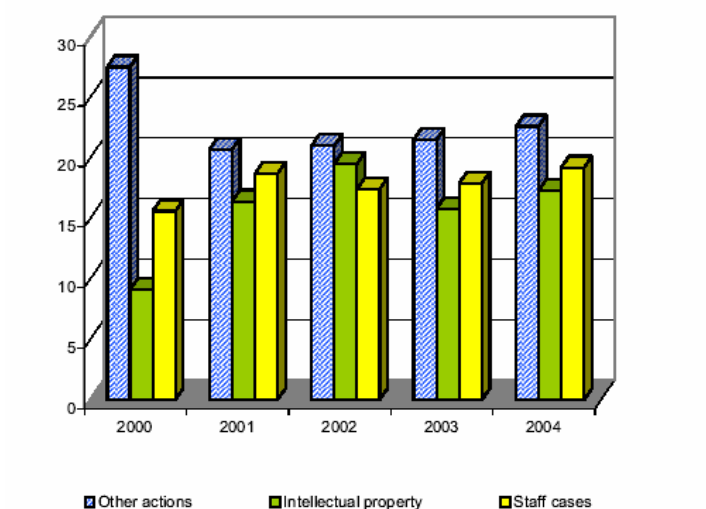
Figure 9. Subject-matter of cases completed 2004

Source: Annual report ECJ 2004

	Judgments	Orders	Total
Agriculture	4	11	15
Approximation of laws		3	3
Arbitration clause	2		2
Commercial policy	1		1
Common foreign and security policy		2	2
Company law		2	2
Competition	22	4	26
Customs union	3		3
Environment and consumers	1	3	4
External relations	4	3	7
Fisheries policy	3	3	6
Free movement of goods	1		1
Freedom of movement for persons		2	2
Intellectual property	47	29	76
Law governing the institutions	3	13	16
Regional policy	1	3	4
Social policy		4	4
State aid	11	43	54
Taxation		1	1
Transport		1	1
Total EC Treaty	103	127	230
Iron and steel	3		3
State aid	1	1	2
Total CS Treaty	4	1	5
Staff Regulations	65	36	101
OVERALL TOTAL	172	164	336

Figure 10. Duration of proceeding of cases completed 2000-2004

Source: Annual report ECJ 2004



	2000	2001	2002	2003	2004
Other actions	27,5	20,7	21	21,5	22,6
Intellectual property	9,1	16,4	19,5	15,8	17,3
Staff cases	15,6	18,7	17,4	17,9	19,2

Figure 11. Appeals against decisions of the CFI 1989-2004

Source: Annual report ECJ 2004

	Number of decisions against which appeals were brought	Total number of decisions open to challenge ¹
1989		
1990	16	46
1991	13	62
1992	24	86
1993	16	66
1994	12	105
1995	47	142
1996	27	133
1997	35	139
1998	67	214
1999	60	178
2000	69	217
2001	69	213
2002	47	212
2003	67	254
2004	53	241

¹ Total number of decisions open to challenge – judgments, and orders relating to admissibility, concerning interim measures, declaring that there is no need to give a decision or refusing leave to intervene – in respect of which the period for bringing an appeal expired or against which an appeal was brought.

2.4. Challenges to the Current Court System

Over the years, the European Court system has encountered various problems, the most important of which relate to the delay and the increasing caseload of the courts and closely linked with this its preliminary reference procedure. In addition, the language regime of the European Union with now, after enlargement, 20 official languages requiring for translation of all judgments has also put a burden on the Court's activities resulting in extra delays and the need for more translation staff. Another problem regarding the Community judicial system is the limited possibility of direct action for individuals, because of the limitations on standing. It is therefore plain that reform of the current judicial system is necessary.⁹⁸ Several reform initiatives have already been adopted and put into practice, others are still being considered. For the purpose of this article the problems of delay, the preliminary rulings system, of seminal importance to the judicial system, the enforcement procedure, access to justice by individuals as well as the specific amendments made by the Constitution will be briefly discussed.

⁹⁸ See European Court of Justice and the Court of First Instance, *The Future of the Judicial System of the European Union (Proposals and Reflections)*, May 1999; Report by the Working Party on the Future of the European Communities' Court System, January 2000 (Due Report).

2.4.1. Delay

Over the years the caseload of the Courts has increased considerably. Together with the case load also concern about the delay has increased. Delay has undoubtedly been of major concern both within and outside the ECJ. This is in particular the case with respect to the preliminary reference procedures where national courts seeking a ruling on the question of Community law have to wait two years or more for an answer. There are many causes of delay, most of which are common to court systems. For example, one factor which affects the productivity of any court is the sheer volume of work. However, the specific nature and features of the ECJ has undoubtedly multiplied the effect of any other factors.⁹⁹ Several initiatives have been undertaken to improve the Court's efficiency. As was set forth in Section 2.2. the Nice Treaty has already enabled the ECJ to transfer workload from the ECJ to the CFI and judicial panels, today the recently created Civil Service Tribunal. Moreover it created the possibility to transfer jurisdiction on preliminary references from the ECJ to the CFI, which is however received with some concern by several actors.¹⁰⁰ Further possibilities for transfer of jurisdiction are clearly open.¹⁰¹

One problem specific to the Community is the language regime, as already pointed out above. Whilst the internal working language of the Court is French, all judgments and opinions have to be translated in all official 20 languages. In order to obviate the delay, several proposals have been made as regards a more selective publication system so to reduce the need to translate a number of texts and documents. In addition, various measures have been designed to shorten the time taken in handling proceedings. They aim to set up a time table for each case, setting targets for each stage of the procedure.¹⁰²

2.4.2. Preliminary Rulings

The system of preliminary rulings without doubt lies at the very heart of the Community judiciary. However, the continued effectiveness of the procedure is particularly vulnerable to

⁹⁹ F.G. Jacobs, 'Recent and ongoing measures to improve the efficiency of the European Court of Justice', (2004) 29 *EL Rev*, 823-830.

¹⁰⁰ See below.

¹⁰¹ Jacobs, *supra* note 99.

¹⁰² *Ibid.*

the delays that result from the increasing size and sophistication of the caseload of the ECJ. During the years, besides the simple increase of the number of cases, the jurisdiction of the ECJ regarding preliminary rulings also extended. Although it is true that we may observe that the number of questions referred has not changed a lot in the past few years, this number is likely to increase in view of the fact that many questions are likely to be referred from courts in the new Member States, and that new legislative initiatives will generate litigation across the Union, even without taking account of the substantial increase in the Court's jurisdiction which might arise under the new Constitution.

It is also clear that the willingness and readiness of national courts which may refer questions depends on the speed at which an answer is given. The prospect of a two-year delay that a preliminary ruling procedure would take before the ECJ, may discourage national judges to refer preliminary questions to the ECJ. This could encourage even those courts which are obliged to refer, to try to avoid to make a reference and resort to one of the exceptions (irrelevant question, *acte éclairé* or *acte clair*¹⁰³). The parties in the basic disputes before national courts, too, may seek to avoid a reference because of the resultant delays. In addition to such practical considerations, the fact that individual rights will frequently be in contention in national proceedings involving Community law heightens the need for expedition.¹⁰⁴

Therefore, various options for reform are currently considered seeing to attempts to control the number of references made to the Court and aiming to increase the efficient handling of references once received, effectively increasing the supply of such services.¹⁰⁵ In view of the steep rise in the number of reference for preliminary rulings between 1990 and 2000 the Courts themselves have submitted several proposals for reform.¹⁰⁶ In their reports of 1999 and 2000 they consider different ways in which this problem could be tackled.¹⁰⁷ The first option considered is to limit the number of national courts that are empowered to make a reference. This option has clearly been inspired by the regime that is currently applicable to Title IV of the Treaty concerning visas, asylum, immigration and other policies concerning the free

¹⁰³ See section 2.2.1.

¹⁰⁴ F. G. Jacobs: 'Possibilities for further reforming the preliminary ruling procedure', 1, see http://www.ccbe.org/colloquium_nov_2004/documents/4_s_jacobs.doc.

¹⁰⁵ Ibid., 2.

¹⁰⁶ Supra note 98.

¹⁰⁷ See P. Craig, 'The Jurisdiction of the Community Courts reconsidered', in: de Búrca and Weiler, supra note 5, 177-214; J. P. Jacqué, 'L'avenir de l'architecture juridictionnelle de l'Union', (1999) 35 *RTDE*, 443-450; A. Arnulf, 'Judicial Architecture or judicial folly? The challenge facing the European Union', (1999) 24 *EL Rev*, 516-524.

movement of persons (Article 68 EC Treaty), explained above. This option is however viewed to be counterproductive as it could encourage litigants at the national level to pursue their cases through to the highest courts in order to gain access to the ECJ.¹⁰⁸ Another option that has been considered is to transfer jurisdiction to rule on preliminary questions to the CFI. As already explained above, this option was introduced by the Nice Treaty. This has however been received with mixed feelings as it is feared to be incompatible with the necessity to safeguard the unity and consistency of Community law.¹⁰⁹ A further option of reform that has been proposed is the introduction of a filtering system by means of which the types of cases heard by the ECJ are limited. This could take the form of a filter based on the novelty, complexity or importance of the question which would prompt the national courts to exercise selectivity in choosing the questions they refer. Another possibility of a filter mechanism would be to require the referring national courts to propose an answer to the question it refers to the ECJ.¹¹⁰

2.4.3. Enforcement Procedure

Over the years the workings of the enforcement procedure have been very much criticised relating in particular to its alleged ineffectiveness, the lack of constraint on the Commission's discretion to pursue cases as well as the inadequate role that is provided for individuals. To some extent the effectiveness has been slightly enhanced by the introduction of the penalty procedure in the Treaty which according to the Commission, is actively used in its enforcement procedure. In reaction to many complaints by individuals about the working of this procedure, the Commission has enhanced the transparency of the procedure.¹¹¹

2.4.4. Limited Possibility for Direct Actions by Individuals

The problem concerns in particular the restricted interpretation of the requirement of individual and direct concern of an individual seeking to challenge an act of the Community institutions. Pursuant to this requirement, any individual seeking the judicial review of a

¹⁰⁸ Due Report, *supra* note 98, 12-14.

¹⁰⁹ Lenaerts, *supra* note 38.

¹¹⁰ There exist many variants of this so-called 'green light' procedure. See Jacobs, *supra* note 104, 67.

¹¹¹ Craig and de Búrca, *supra* note 4, 430.

measure addressed to another person, has to show that he is individually concerned. However, the ECJ interpreted this condition in such a manner (the applicant has to show that he or she has attributes which distinguish him or her from all other persons and mark him or her in the same manner as the addressee) that it is practically impossible for individuals to successfully show individual concern before the ECJ. Although there have been some attempts to amend this approach, it is still considered to be the current view.¹¹² Although of course there is always the possibility of indirect action via the national courts, this depends on the willingness of the national courts to refer the case to the European courts, whilst there are also limitations in this preliminary procedure, as it does not allow all parties concerned by the Community act to participate in the proceedings before the European Courts and it is not always possible for the Courts to investigate the matter as a direct action against the institution that adopted the disputed measure.¹¹³ The new Constitution tries to remedy some of this critique by broadening the possibility of direct actions for individuals. It provides that any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.¹¹⁴ Yet, one can argue that this change is of limited significance since a regulatory measure does not include legislative acts.¹¹⁵

2.4.5. Amendments Introduced by the Constitution

The Constitution¹¹⁶ is both a treaty subject to the rules of international law and a Constitution in that it contains elements of a constitutional nature.¹¹⁷ To a large extent, the Constitution does nothing more than consolidating the present EC and EU Treaties. However, if the

¹¹² This is also addressed by the Constitution in Article III-365 (4).

¹¹³ Craig and de Búrca, *supra* note 4, 532.

¹¹⁴ Constitution, Article III-365 (4).

¹¹⁵ R. Barents: 'The Court of Justice in the Draft Constitution', (2004) 11 *MJ*, 121-141.

¹¹⁶ OJ C 2004, 310 16 December 2004, 1.

¹¹⁷ See in general on the constitution, e.g. A. Peters, 'European democracy after the 2003 convention', (2004) 41 *CML Rev*, 2004, 37-85 and A. Dashwood and A. Johnston, 'The institutions of the enlarged EU under the regime of the Constitutional Treaty', (2004) 41 *CML Rev*, 1481-1518. See also J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, Cambridge 1999).

Constitutional treaty will be ratified,¹¹⁸ several significant changes relating to the judiciary will be introduced, the important ones of which will be discussed below.¹¹⁹

First of all, the Constitution introduces a change of name of the Court of Justice. The ‘Court of Justice of the European Union’ thus shall include the Court of Justice, the General Court and specialised courts. It shall ensure that the law is observed in the interpretation and application of the Constitution.¹²⁰

Second, in view of the fact that the Constitution will replace the present three-pillar structure with one single Union structure, the Court will have jurisdiction over all the provisions of the Constitution, with the following exceptions. The Court will have no jurisdiction with respect to the common foreign and security policy.¹²¹ Moreover, in exercising its powers regarding the provisions relating to the area of freedom, security and justice, the Court of Justice will have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.¹²² Therefore, former second-pillar matters (common foreign and security policy) are still excluded from the jurisdiction of the Community Courts. However, the Court shall have jurisdiction to monitor that the implementation of the common foreign and security policy does not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences. The ECJ can rule on application for the judicial review of the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of the common foreign and security policy.¹²³

Regarding former third pillar matters, the Constitution does in no way restrict direct actions, the limited preliminary procedure provided for by Article 68 EC and the facultative

¹¹⁸ See the state of play as regards ratification at http://europa.eu.int/constitution/referendum_en.htm.

¹¹⁹ For a fuller account of the changes affecting the European Courts, see Barents, *supra* note 115. For a brief account of the main provisions of the new Constitution see http://www.europa.eu.int/constitution/why_en.htm.

¹²⁰ Constitution, Article I-29.

¹²¹ Constitution, Article III-376 (1).

¹²² Constitution, Article III-377.

¹²³ Constitution, Article III-376 (2).

preliminary procedure of Article 35 TEU.¹²⁴ Further, infringement procedures for failure to fulfil an obligation under the Constitution also relate to these matters. The above amounts to a considerable improvement compared to the present situation, in particular in view of the potential significance of the rights included in the Charter of Fundamental Rights and of the unity of Union law (especially for the Union's international private law).¹²⁵

Third, as already indicated above, the Constitution will also facilitate individuals' access to the Court. In addition, a new provision is inserted requiring the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.¹²⁶ Finally, a change of administrative nature is that an advisory panel is to be established to formulate an opinion on the suitability of the candidates for judges and Advocates General.¹²⁷

2.4.6. Towards a New Judicial Architecture?

The president of the ECJ, Mr. Vassilios Skouris recently pointed out that the Court of Justice is now preparing one of its greatest challenges of reform in its 52-year history.¹²⁸ It is clear from the above that the reform is still very much open to debate. In a reflection on the judicial architecture after the Nice Treaty, J. Weiler made some interesting proposals for reform.¹²⁹ He forcefully argues that as the effective operation of the Court is not just a question of workload but also of competences and credibility, some more fundamental changes are needed. He thus proposes to reverse the habitual positioning of the ECJ and the CFI. It should so be the CFI which is to become the centrepiece of the judicial system, 'its workhorse' and the ECJ should sit at the hierarchical apex as the Supreme Court of the European Union. This reversal would entail that the preliminary questions would, in most cases be referred to the CFI.¹³⁰ This possibility is currently already provided for in the Treaty.¹³¹ This would require the CFI also to have its own specialized chambers or divisions. Moreover, the number of judges of the CFI should be decided purely on a functional basis, which the Nice Treaty already allows for. All

¹²⁴ Barents, *supra* note 115, 131.

¹²⁵ *Ibid.*

¹²⁶ Constitution, Article I-29.

¹²⁷ Constitution, Article III-357.

¹²⁸ V. Skouris, 'The European Court of Justice after enlargement: Current trends and future challenges', see http://www.ccbe.org/colloquium_nov_2004/documents/paper_skouris.doc

¹²⁹ Weiler, *supra* note 37, 215-226.

¹³⁰ This is also proposed by H. Rasmussen, 'Remedying the Crumbling EC Judicial System', (2000) 37 *CML Rev.* 1071-1112.

this would mean that the CFI would have the plenary jurisdiction under the existing jurisdiction of the ECJ. It would thus entertain both direct actions and preliminary rulings. The elevated number of judges would be able to eliminate the current delays.

In Weiler's vision, the ECJ would become a kind of European supreme court. It would have jurisdiction in cases of appeal in direct actions and, this would be new, appeal from preliminary rulings. In cases where a preliminary reference is made by the highest courts, Weiler proposes to include an ad-hoc judge of that court, albeit not from the group of judges deciding the case. This recast ECJ has an impact on its composition and should reflect on attracting judges with experience in constitutional matters. Weiler furthermore argues that the style of judicial decisions should be changed as it is outmoded, does not reflect the dialogical nature of European constitutionalism and is no basis for constitutional relationship between the European court and its national counterparts. He proposes that the Court moves towards more discursive, analytical and conversational style that is habitual in the common law world, whilst the Court would also be asked to show that national sensibilities are taken into account. In this new architecture, a proactive relationship between the national and European courts should be encouraged. A new style of conversation between these courts should then encourage national courts at all levels not merely to ask the question but also to propose what they think the correct solution should be, and importantly, also to inform the European court in the referring question itself of the constitutional and other concerns that the national legal order has.¹³²

2.5. The European Court System Compared: the Andean, African and ASEAN Systems

2.5.1. The Andean Judicial Dispute Settlement Mechanism

A. The Andean Community

¹³¹ Article 225 (3) EC Treaty.

¹³² Weiler, *supra* note 37.

The Andean Community finds its origins in 1969 in the Cartagena Protocol of 1969 (the Andean Pact) establishing a customs union within a period of ten years. Over the next three decades, Andean integration passed through a series of different stages. Important institutional and policy reforms were made by the Protocols of Trujillo and Sucre of 1996 and 1997. The institutional reforms created the Andean Community and the Andean Integration System. Importantly, the policy reforms extended the scope of integration beyond the purely trade and economic areas. The Andean Community started operating on August 1, 1997 with a Secretariat General, whose headquarters are in Lima (Peru), as its executive body. The Council of Presidents and the Council of Foreign Ministers were formally established as new policy-making and leadership bodies.

B. The Institutional Structure of the Andean Community

The institutional structure of the Andean Community is similar to that of the European Union (see Figure 12.). Its main institutions are the Council, the Commission, the Secretariat General, the Andean Parliament and the Court of Justice of the Andean Community. The Presidential Andean Council is the highest institution of the Andean System of Integration (SAI) and can be compared with the European Council. It consists of the Heads of State or Government of the Member States. It meets once a year, and every time they consider necessary. There is a president that rotates every year in alphabetic order. The Council defines the politics of the integration; it orientates and stimulates the actions in matters of interest of the Sub-region; evaluates the development and the results of the process of integration; it expresses pronouncements on the reports and recommendations presented by the organs and institutions of the Andean System of Integration.

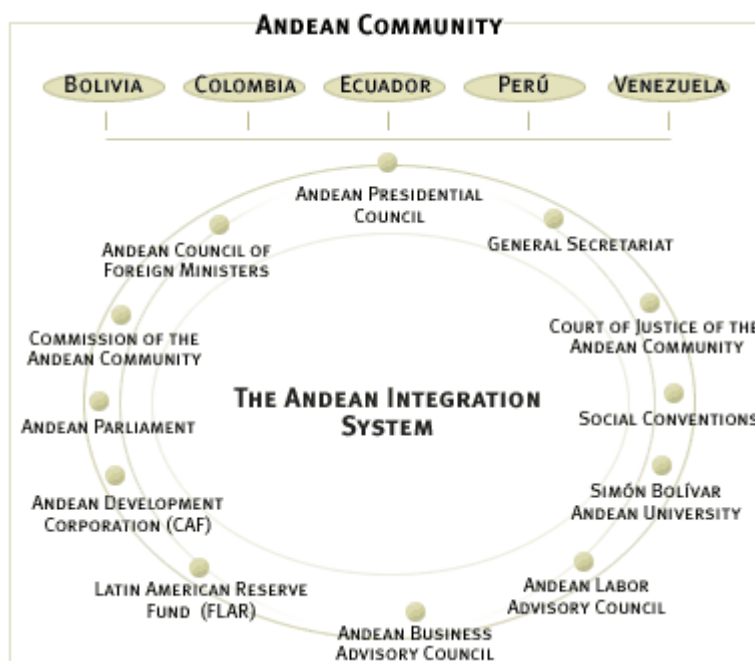
The Andean Council of Ministers of Foreign affairs gives political direction to the development of the integration process. It needs to assure the attainment of the aims of the process of the integration and to formulate and execute the foreign affairs politics of the Andean Community. The Commission is the legislative organ of the Andean System of Integration. Their members are plenipotentiary representatives of each one of the Countries Members, whose legislative capacity expressed in the adoption of Decisions, shares it now with the Ministers' Andean Council of Foreign affairs. The Commission formulates, executes and evaluates the politics of the Andean integration; it adopts the necessary measures for the

achievement of the objectives of the Agreement of Cartagena, as well as for the fulfilment of the Directives of the Presidential Andean Council. The Secretariat General of the Andean Community is the executive organ that is responsible to administer the process, is the guardian of the community commitment. It has capacity of initiative to formulate proposition of Decision to The Andean Council of Ministers of Foreign affairs and to the Commission, as well as initiatives and suggestions to facilitate or to accelerate the fulfilment of the Agreement of Cartagena. Hence the tasks performed by the Andean Commission and the Secretariat General can be compared to the tasks carried out by the European Commission.

The Andean Parliament represents the people of the Andean Community. Nowadays, it is composed by representatives of the national parliaments. Its tasks are to take part in the legislative process, by suggestions to the organs of the System and it presents projects of common interest. Moreover, it needs to promote the harmonization of the legislations of the Member States and the relations of cooperation and coordination with the Parliaments of the Andean countries and of third countries. In conclusion, the Court of Justice of the Andean Community is the judicial organ of the Andean Community.

Figure 12. The institutional structure of the Andean Community

Source: Andean Community, <http://www.comunidadandina.org/ingles/who.htm>



C. The Andean System of Dispute Settlement

The Andean Court of Justice is composed of five judges, with one judge of each one of the Member States. The judges are pointed for six years, with territorial competition in five countries and with permanent headquarters in Quito, Ecuador. The judges must be nationals of the Member Countries, enjoy a good moral reputation, and fulfil the necessary conditions for exercising the highest judicial functions in their respective countries or be highly competent jurists.¹³³ The Court controls the legality of the Community norms and interprets the Community norms to assure the uniform application of these in the territory of the Member States. Like the European Union, also the Andean Community has specific procedures for dispute settlement, which also can be divided into direct actions (action for annulment of Community measures¹³⁴ or inaction of the institutions,¹³⁵ infringement procedure¹³⁶ and arbitration¹³⁷ and staff¹³⁸ cases) and preliminary rulings.

I. Direct Actions

i) The Infringement Procedure

The infringement procedure before the Andean Court is similar to the one before the European Court. Article 23 of the Treaty of the Andean Court enables the Secretariat General, which considers that a Member State has failed to fulfil an obligation under the legal order of the Andean Community, to bring the matter before the Andean Court. Also Member States are allowed to bring a case against an alleged infringement of another Member States before the Court.¹³⁹ The procedure requires that the Secretariat General shall deliver a reasoned opinion informing the Member State concerned of the infringement. The Member State concerned is then given the opportunity to submit its own case and its observations within a period of 60 days maximum. Upon the reaction of the Member State or upon the expiry of the time limit, the Secretariat General will give an administrative ruling on the state of

¹³³ Article 6 of the Treaty Creating the Court of Justice of the Cartagena Agreement as amended by the Cochabamba Protocol.

¹³⁴ Called the nullity action. See Article 17 and following of the Treaty on the Court.

¹³⁵ Called action due to omission or inactivity, Article 37 and following of the Treaty on the Court.

¹³⁶ Called action for non-compliance, Article 23 and following of the Treaty on the Court.

¹³⁷ Article 38 and following of the Treaty on the Court. See the article by A. Sierralta R., in this volume.

¹³⁸ Called labour cases, see Article 40 of the Treaty on the Court.

¹³⁹ Article 24 of the Treaty on the Court.

compliance. In case the Secretariat General views that there is a situation of non-compliance, it will start procedures before the Andean Court.

Also Member States may bring a case about an alleged infringement of another Member State before the Court. In that case, just as is the case with the European judicial procedures, that Member State is required to first complain to the Secretariat General of the Andean Community. If the Secretariat General of the Andean Community has not delivered an opinion within 65 days of the date on which the matter was brought before it, the Member State may bring the case directly before the Court of Justice.

It was only in 1996 that a first case concerning the infringement procedure brought before the Andean Court was successful. This case was initiated by the former Joint Committee of the Cartagena Agreement (now the Secretariat General of the Andean Community). Since 1996 there have been 79 cases for infringement brought before the Andean Court. Of these cases 70 cases have been initiated by the Secretariat General whilst only 3 cases were initiated by the Member States. In the period from 1995 till 2004, the Secretariat General issued 176 administrative rulings establishing an infringement of the Andean norms (see Figure 13).¹⁴⁰

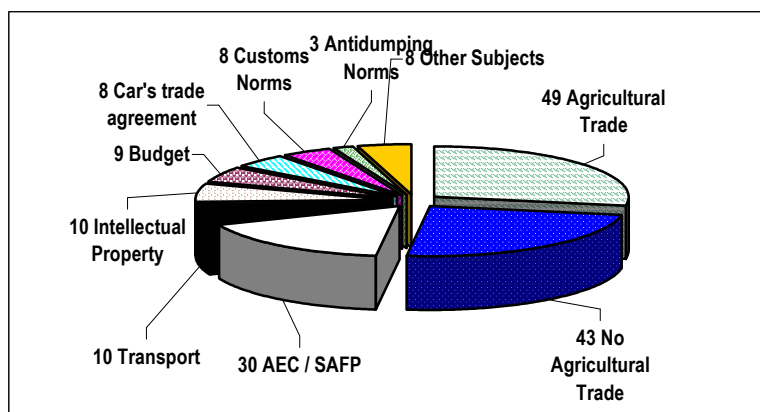
Interestingly from a European perspective, also individuals whose rights are affected by the failure of the Member State to fulfil its obligations are allowed to bring a case before the Court. They however first have to complain to the Secretariat General in accordance with the procedure prescribed for the Member States.¹⁴¹

Figure 13. Resolutions of the Secretariat General Establishing an Infringement of the Andean norms (1995 - October, 2004) (AEC = common external tariffs and SAEP = Andean system of prices)

Source: SG/dt 258/Rev.1, 22 de octubre de 2004, 0.11.10, Solución De Controversias Derivadas De Incumplimientos En La Comunidad Andina

¹⁴⁰ SG/dt 258/Rev.1, 22 de octubre de 2004, 0.11.10, Solución De Controversias Derivadas De Incumplimientos En La Comunidad Andina.

¹⁴¹ Article 25 of the Treaty on the Court.



ii) Action for annulment of measures or inaction of the institutions

The Andean Court has also jurisdiction to review the legality of acts adopted by the Andean Institutions. Contrary to the European situation in which the voting behaviour of Member States is not of any significance for the legal standing before the European Court, in the Andean judicial system, Member States can only bring an action before the Court against acts that were approved without their affirmative vote.¹⁴² The possibility for natural or legal persons to initiate proceeding against acts adopted by the Andean Institutions seems somewhat broader than in the European system as the acts must affect their subjective rights or their legitimate interests (in the European situation: 'of individual and direct concern'). As of 1996, this procedure was used six times of which only two were declared admissible.

Figure 14. Total number of cases brought before the Andean Court of Justice

Source: SG/dt 258/Rev.1, 22 de octubre de 2004, 0.11.10, Solución De Controversias Derivadas De Incumplimientos En La Comunidad Andina

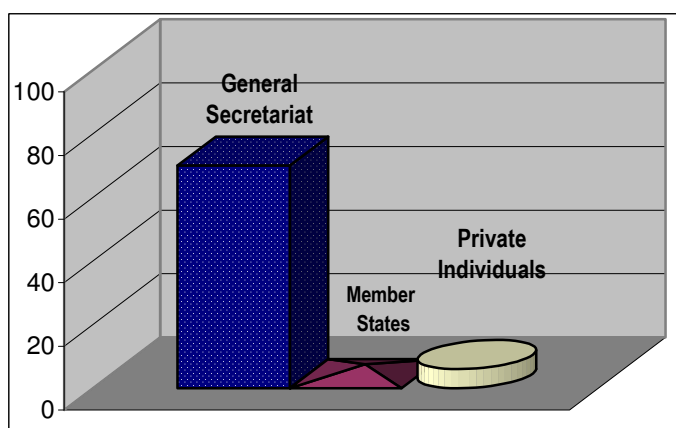
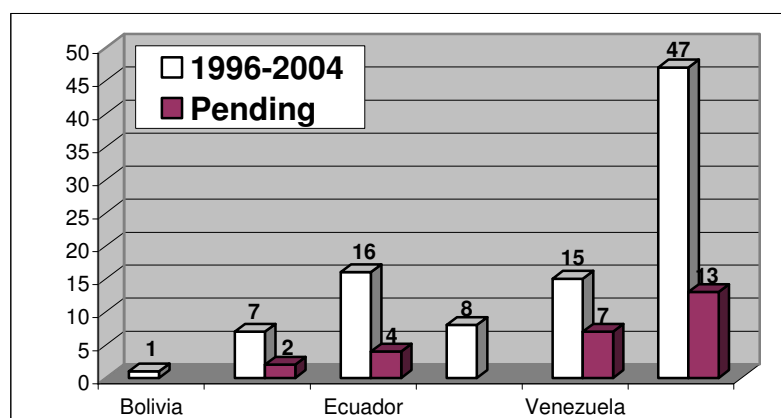


Figure 15. Infringement procedure: Cases completed and pending before the Andean Court (1996-2004)
Source SG/dt 258/Rev.1, 22 de octubre de 2004, 0.11.10, Solución De Controversias Derivadas De Incumplimientos En La Comunidad Andina.



II. Preliminary Rulings

As already indicated above, also the Andean Court System disposes of a preliminary ruling system. Any court or tribunal of a Member State may, if it considers that a decision on the question is necessary to enable it to give judgment, requests the Court of Justice to give a ‘prejudgment’ on the interpretation of acts of the institutions of the Andean Community.¹⁴³ Since 1987 until April, 2004, the Andean Court has given more than 600 judgments of requiring a preliminary examination interpretation. More than 95 % were about intellectual property. Colombia and Ecuador courts have used this procedure most frequently, whilst Perú and Venezuela used this procedure only in two occasions. Bolivia used it only once.¹⁴⁴

2.5.2. The African and ASEAN Systems

¹⁴² Article 17 of the Treaty on the Court.

¹⁴³ Article 32 and following of the Treaty on the Court.

¹⁴⁴ SG/dt 258/Rev.1, 22 de octubre de 2004, 0.11.10, Solución De Controversias Derivadas De Incumplimientos En La Comunidad Andina.

Also the Asian and African integration processes dispose of dispute settlement mechanisms.¹⁴⁵ In the case of the African Union, the Protocol of the Court of Justice of the African Union provides for the establishment of a Court of Justice of the Union, pursuant to the Constitutive Act and the Protocol.

The Court has jurisdiction over all disputes and applications referred to it in accordance with the Act and the Protocol which, among others, may concern:

- (a) the interpretation and application of the Act and the Union treaties and all subsidiary legal instruments adopted within the framework of the Union;
- (b) all acts, decisions, regulations and directives of the organs of the Union;
- (c) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
- (d) the nature or extent of the reparation to be made for the breach of an obligation.¹⁴⁶

The Court, therefore, performs three of the functions of an international judicial system, that are peacefully settling disputes, offering legal advice and properly interpreting the controversial articles of the constitutional law. The rationale having taken into account being that first, the peaceful settlement of disputes is deemed a common denominator under all international judicial systems. Within the context of the African Union this function is further considered of major importance as it stands the only means to maintaining international and regional peace and security. Furthermore, the advisory function plays another key role asserting the need for a judicial system within the African Union. Finally, the Act's interpretation stands also a major function of any international organisation's court of justice.¹⁴⁷

Another international organisation, the COMESA (Common Market for Eastern and Southern Africa) also has established its own Court of Justice. As pointed out, the Court of Justice benefits the process of economic integration since it provides one integrated strong judicial body rather than three weak judicial bodies. Furthermore, a strong Court of Justice addresses the issue of enforcement of decisions taken collectively and also allows for legal or natural

¹⁴⁵ See for an overview of the integration processes, E. Best, in this volume.

¹⁴⁶ Article 19 of the Protocol.

persons affected by any act of the organs of the community or its member states, or unlawful infringement of the provisions of the Treaty, to request the Court to determine the legality of such acts.¹⁴⁸ In that regard it is worth noting that the COMESA, besides being created by law, pursues its aims exclusively through a new body of law, that is COMESA law, which is independent and uniform in all the member states of the COMESA. Therefore, the COMESA legal system needs an effective system of judicial safeguards when the law is challenged or must be applied. The Court of Justice, as the judicial organ of the COMESA is the backbone of such a system of safeguards. Its judges will ensure that the law is interpreted and applied in each member state uniformly. In order to fulfil that role, the Court of Justice has jurisdiction to hear disputes to which member states, the Secretary General and residents of member states (individuals and legal persons) may be parties.¹⁴⁹

Interestingly enough, the ASEAN (Association of Southeast Asian Nations) has no judicial body which could be described as equivalent to the European Court of Justice. In that regard it has to be pointed out that at the Ninth ASEAN Summit in Bali, ASEAN leaders have agreed to establish an ASEAN Economic Community (AEC) by 2020. In lieu of that, several sources call for the establishment of a judicial organ. It is argued that the main idea of the ASEAN integration is of economic nature, relatively similar to that of European Union. Bearing that in mind, one can conclude that the substantial link between economic integration and legal cooperation is that economic integration serves as the goal and legal cooperation functions as one of the means to achieve it.¹⁵⁰ Presently, the opportunities to implement legal cooperation among ASEAN members are opening wide. Furthermore, if possible, a higher degree of legal cooperation such as ASEAN Arbitral Tribunal or even an ASEAN Court of Justice needs to be established, dealing with an agenda ranging from human rights to breach of contract.¹⁵¹ In concert with that, at one of the round tables to which the above initiative has given rise to, it was argued that ASEAN should consider setting up two supranational bodies, one of them being an ASEAN Court of Justice, which is to be responsible for dispute settlement.¹⁵²

¹⁴⁷ A. Rashidi, 'AU's Judicial System', see:

<http://www.sis.gov.eg/public/africanmag/issue12/html/study07.htm>

¹⁴⁸ http://www.comesa.int/institutions/court_of_justice/Multi-language_content.2003-08-21.2608/view

¹⁴⁹ Ibid.

¹⁵⁰ Asean Legal Cooperation In The Framework Of Asean Integration: Strength, Weaknesses, Opportunity, & Threat (Swot) Analysis, <http://www.theceli.com/berita/detail.php?tiptpe='a'&news=71>

¹⁵¹ Ibid.

¹⁵² Denis Hew: 'ASEAN Commits to Deeper Economic Integration', <http://www.iseas.edu.sg/viewpoint/dhocht03.pdf>

3. Alternative Dispute Settlement Mechanisms

As already indicated above, the dispute settlement by means of the courts is not the only means of dispute settlement in the European Union. In addition to these ‘last resort’ judicial mechanism, over the years the European Union has created many alternative, ‘soft-law’ mechanisms consisting of various initiatives and or the creation of various platforms for both Member States, institutions and individuals to resolve their conflicts. Next to these, what we may call alternative or out-of-court dispute settlement mechanisms, we may also observe several mechanisms that aim to prevent disputes from occurring.

3.1. Disputes Between Members States and the Commission

3.1.1. Comitology as a Problem-Solving Forum

Already since the early existence of the Community, the Community disposes of a mechanism by means of which the Council delegates powers to the Commission. This delegation of powers is conditional in the sense that the Commission, in the exercise of its powers and before adopting any decisions needs to consult committees that are composed of national representatives which are created for that purpose. This system is known as ‘comitology’. Although there has been a great deal of debate on the functioning of these committees, as their existence would upset the institutional balance of powers and there was a great lack of transparency of their operation, both empirical research and theoretical underpinnings have argued that over the years decision-making involving comitology has led to a more consensual and problem-solving approach to decision-making between the Commission and the committees. Being both bureaucrats and national representatives at the same time, committees act as co-ordinating bodies between supranational and national, and governmental and social actors and may (but not always do) voice national viewpoints.

Here the dual character of these committees must be emphasized: committees are composed of national representatives who generally, but not necessarily, are civil servants. On the one hand, these committees, in their composition of national *bureaucrats*, function as a forum of interaction and co-operation between the Member States and the Commission. In this way, the

significance of purely national interest has been diminished, contributing to the overall trend of greater transnational decision-making, in which national interests are replaced by technical expertise, socio-economic interests and administration. On the other hand, however, these committees, in their composition of national *representatives*, have acted as ‘*mini Councils*’. They potentially enhance the importance of the national interests and contribute to the decline of supranational decision-making. These committee mechanisms generally provide for co-operation between all the levels concerned and might address Member States’ concerns for unnecessary Community activities. Seen in this light committees might be argued to have pragmatically secured subsidiarity. The participation of committees in the executive action of the Commission may therefore be argued to create a framework for cooperative and deliberative multilevel policy-making,¹⁵³ and makes the action of the Commission more democratic and ‘closer to the citizen’,¹⁵⁴ whilst producing good and effective decision-making. Committees may, moreover, contribute to a less top-down approach in the sense of less ‘Brussels’ (i.e. the Commission) – and more ‘Member State’ participation, and therefore, citizen participation. Moreover, committees may complement the limited staff resources in the Commission.¹⁵⁵ Certainly, in terms of efficiency and transparency, the comitology practice has left much to be desired. Although these drawbacks have to some extent been addressed by the 1999 Comitology Decision, they still beg for improvement. In view of the accession of the new Member States reform of the comitology system is necessary. This problem will not be resolved by the new Constitution.¹⁵⁶

3.1.2. Prevention of Conflicts and ‘Out-of-court’ Dispute Settlement in the Field of Food Safety

¹⁵³ See for an elaborate discussion on the role of committees, e.g. C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, (Hart Publishing, Oxford 1999). See also E. Vos, *Institutional Frameworks of Community Health and Safety Regulation, Committees, Agencies and Private Bodies* (Hart Publishing, Oxford 1999).

¹⁵⁴ Also K. Lenaerts and A. Verhoeven, ‘Towards a Legal Framework for Executive Rule-making in the EU? The Contribution of the New Comitology Decision’, (2000) 37 *CML Rev*, 645-686, 664.

¹⁵⁵ See L. Allio, ‘The Case for Comitology Reform: Efficiency, Transparency, Accountability. From Legislation to Implementation: the Future of EU Decision-making’, in L. Allio and G. Durand, Brussels, European Policy Centre Working Paper/02: 32-72, 39.

¹⁵⁶ See E. Vos, ‘The fall of committees?’ in J. W. de Zwaan, J. H. Jans, F. A. Nelissen, S. Blockmans (eds.), *The European Union - An Ongoing Process of Integration* (Cambridge University Press, Cambridge 2004).

In view of the sensitivities of food safety regulation, the Community legislation has provided for two interesting procedures which see to conflict situations, one procedure concerns conflicts in scientific opinion and the other concerns conflicts between Member States.

A. Scientific ‘Conflicts’

First, in addition to the embedment of EFSA in networks of national authorities and scientists and the installation of a possibility of administrative review as regards acts of the EFSA in the framework of the GM food and feed regulation,¹⁵⁷ the General Food Law (GFL) encourages the convergence of opinions of European Food Safety Authority (EFSA) and other European and national bodies by pro-actively encountering possible conflicting opinions. Thus the General Food Law requires first EFSA to be vigilant in determining the possibility of diverging scientific opinions at an early stage of the analysis process. It ‘shall exercise vigilance in order to identify at an early stage any potential source of divergence between its scientific opinions and the scientific opinions issued by other bodies carrying out similar tasks’.¹⁵⁸ Subsequently, the GFL addresses the problem of the actual existence of ‘diverging scientific’ opinions of national authorities and/or other European organs and the EFSA. In order to prevent situations such as the conflict on the lift of the export ban on British beef¹⁵⁹ from recurring in the future, the GFL imposes a kind of duty of cooperation on the EFSA and the bodies involved.¹⁶⁰ It herewith builds on an informal practice of the Scientific Committee on Foodstuffs which acted as ‘arbiter’ (with an advisory status) in conflicts between Member States as regards the free movement of certain foodstuffs and provided scientific assessments of the requests for approval for any compound or preparation of food by a manufacturer, which were submitted to the Commission.¹⁶¹ Where EFSA is aware of a potential divergence in opinion between it and a national authority, it must contact the national authority to ensure

¹⁵⁷ Article 36, Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ L 2003, L 268/1.

¹⁵⁸ Article 30, Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 2002, 31/1.

¹⁵⁹ See Case C-1/00, *Commission of the European Communities v French Republic* [2001] ECR I-9989.

¹⁶⁰ Article 30, Regulation 178/2002, supra note 158.

¹⁶¹ See Van der Heijden, ‘The Scientific Committee for Food: Procedures and Program for European Food Safety’, (1992) *Food Technology*, 104.

that they share all of the relevant information and to identify the points on which there is potential divergence.¹⁶²

In the case of a substantial divergence of opinion, EFSA and the national authority or other Community organs with the divergent opinion shall be obliged to cooperate with a view to resolving the divergence.¹⁶³ It is important to note that, in view of the fact that EFSA has not been conferred upon the power to resolve the conflict, it here operates more as a kind of ‘watchdog’.¹⁶⁴ In case of diverging scientific points of view, it is not automatically EFSA’s advice which is determinant. In such cases, the advice of other bodies must, rightly so, be taken into account. In case EFSA and the bodies concerned cannot come to a common solution and ‘substantive divergence over scientific issues’ continues to exist, they are required to submit a joint document to the Commission in which the contentious scientific issues are clarified and the scientific uncertainties are identified and communicated to the Commission.¹⁶⁵ It may be wondered whether in such cases a credible compromise can be reached. Damien Chalmers even warns that in situations where different methodologies or opposing data are used, a joint document could be used to undermine the credibility of the other. Such a document could therefore highlight internal crises of sciences and provoke crises of confidence in scientific expectations, and, at the same time, promote beliefs in a zero-risk world. This, in turn, could affect confidence in the analytical rigour of the EFSA.¹⁶⁶

B. Member State vs Member State: the Mediation Procedure

Second, the GFL introduces a, what is called, mediation procedure which concerns situations of conflicts between Member States.¹⁶⁷ In these cases the Commission acts as a mediator. This mediation procedure resembles the above mentioned ‘conflict procedure’. If one Member State considers that another Member States’ measure is either not compatible with the provisions laid down in the GFL or with the internal market, the Member State informs

¹⁶² Article 30(2), Regulation 178/2002, *supra* note 158.

¹⁶³ Articles 30(3) and (4), Regulation 178/2002, *supra* note 158.

¹⁶⁴ K. Szawlowska, ‘Risk Assessment in the European Food Safety Regulation: Who is to Decide Whose Science is Better? Commission v. France and Beyond...’ (2004) 10 *German Law Journal*, 1259-1274.

¹⁶⁵ Article 30(3), Regulation 178/2002, *supra* note 158. According to Article 27 (4) b), Regulation 178/2002, *supra* note 158, the Advisory Forum has a special task to fulfil in this procedure.

¹⁶⁶ D. Chalmers, ‘“Food for Thought” Reconciling European Risks and Traditional Ways of Life’ (2003) 66 *Modern Law Review*, 532-562, 549.

¹⁶⁷ Article 60, Regulation 178/2002, *supra* note 158.

the Commission of the measure. The two Member States and the Commission shall, so the GFL prescribes, ‘make every effort to solve the problem’. If no agreement is reached, the Commission may request EFSA to give an opinion on any relevant contentious scientific issue. A similar procedure already exists in the field of medicines and seems quite successful.¹⁶⁸ The practice in the field of GMO’s shows that this is likely to be more difficult in the field of foodstuffs. The introduction of the mediation procedure certainly is an interesting development. Apparently there was a need felt for a procedure outside of the normal comitology committee, the SCFAH. This is all the more interesting as the SCFAH has formally been assigned a broader task outside of the comitology procedure, being allowed to examine ‘any issue falling under those provisions, either at the initiative of the Chairman or at the written request of one of its members’.¹⁶⁹ Does this mean that deliberate problem-solving within the framework of the SCFAH is at risk or does it ‘simply’ give expression to the need for pursuing a faster and slimmer procedure outside of the forum offered by the SCFAH?

3.2. Disputes Between Individuals and the EU Institutions: the Ombudsman

The position of European Ombudsman was created by the 1992 Treaty on the European Union. The Ombudsman acts as an intermediary between the citizen and the EU authorities. In April 2003 Mr Nikiforos Diamandouros was appointed Ombudsman. The Ombudsman is entitled to receive and investigate complaints from EU citizens, businesses and institutions, and from anyone residing or having their legal domicile in a Member States. The Ombudsman is elected by the European Parliament for a renewable term of five years. He helps to uncover ‘maladministration’ in the European institutions and other EU bodies. ‘Maladministration’ means poor or failed administration. Examples are abuse of power, discrimination, unnecessary delay etc. The Ombudsman carries out investigations on his own initiative or following a complaint. A complaint can be made by using the electronic complaint form that is available on the website of the European Ombudsman.¹⁷⁰ If the Ombudsman discovers a case of maladministration, he informs the institution concerned and makes draft

¹⁶⁸ Albeit within the framework of the Mutual recognition Facilitation Group, see EMEA.

¹⁶⁹ Article 59, Regulation 178/2002, supra note 158.

¹⁷⁰ Available at: <http://www.euro-ombudsman.eu.int/form/en/form2.htm>

recommendations. The institution concerned has three months to give its detailed opinion on the matter. The Ombudsman then submits a report to the European Parliament and to the institution concerned. He also lets the complainant know the outcome of the investigations. Every year, the Ombudsman gives the European Parliament a report on all his investigations.

The Ombudsman received in 2003 2,436 complaints, a 10% increase compared to 2002. Partly this was due to a concerted effort to inform citizens of their rights. Nearly half the complaints were sent to the Ombudsman electronically, either by e-mail or using the complaint form on the Ombudsman's website. In almost 70% of the cases, the Ombudsman was able to help the complainant by opening an inquiry into the case, transferring it to a competent body, or giving advice on where to turn for a prompt and effective solution to the problem. A total of 253 new inquiries were opened during the year. The Ombudsman also dealt with a large number of requests for information, of which 2,538 were sent by e-mail. The Ombudsman made decisions closing 180 cases following inquiries. In 87 cases, the Ombudsman's inquiry revealed no maladministration. In 48 cases, the Ombudsman's inquiry resulted in the institution or body concerned settling the case to the full satisfaction of the complainant. While 7 proposals for friendly solutions were still under consideration at the end of 2003, 4 were achieved in the course of the year.¹⁷¹

3.3. Disputes Between Individuals and the Commission in the Area of Competition Law: Enforcement

In the field of competition law, the Commission has important powers in problem-solving, having been conferred upon strong powers of enforcement of competition provisions. Following the reform of 2003 which introduced a more decentralised regime, the Commission still is charged with the duty of ensuring that Articles 81 (cartels) and 82 (dominant position) of the EC Treaty are implemented.¹⁷² Hence, the Commission has been granted both investigative and inspection powers. The Commission has broad investigative powers such as the power to request information, the power to take statements and the power to carry out

¹⁷¹ Annual report of the Ombudsman 2003, see <http://www.euro-ombudsman.eu.int/report/en/default.htm>

¹⁷² Article 85 EC Treaty.

certain inspections.¹⁷³ Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end.¹⁷⁴ For this purpose, it may impose on them any behavioural or structural remedies, which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Natural or legal persons who can show a legitimate interest and Member States are entitled to file a complaint. An elaborate Commission Notice is available on the details of filing such a complaint.¹⁷⁵ In a decision the Commission can finally impose sanctions, such as fines and periodic penalty payments.¹⁷⁶ Further details on the conduct of the proceedings are laid down in Regulation 773/2004.¹⁷⁷

3.4. Disputes Between Individuals and Member States: SOLVIT

SOLVIT is an on-line problem-solving network in which the Member States work together to solve without legal proceedings problems caused by the misapplication of Internal Market law by public authorities.¹⁷⁸ There is a SOLVIT centre in every Member State (as well as in Norway, Iceland and Liechtenstein). SOLVIT Centres can help with handling complaints from both citizens and businesses. They are part of the national administration and promise to provide solutions to problems within 10 weeks. SOLVIT has been working since July 2002 and using SOLVIT is free of charge. The European Commission coordinates the network, which is operated by the Member States, the European Commission provides the database facilities and, when needed, helps to speed up the resolution of problems. The Commission also passes formal complaints it receives on to SOLVIT if there is a good chance that the problem can be solved without legal action. Producers or traders can submit a case to SOLVIT when their complaint is caused by an incorrect application of EC law and when their complaint is addressed at a public authority. The handling of disputes between business-to-business or consumer-to-business fall outside the scope of SOLVIT. The policy areas

¹⁷³ Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1, Chapter 5.

¹⁷⁴ Article 7, Regulation 1/2003, supra note 173.

¹⁷⁵ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004, C101/65.

¹⁷⁶ Chapter 6, Council Regulation 1/2003, supra note 173.

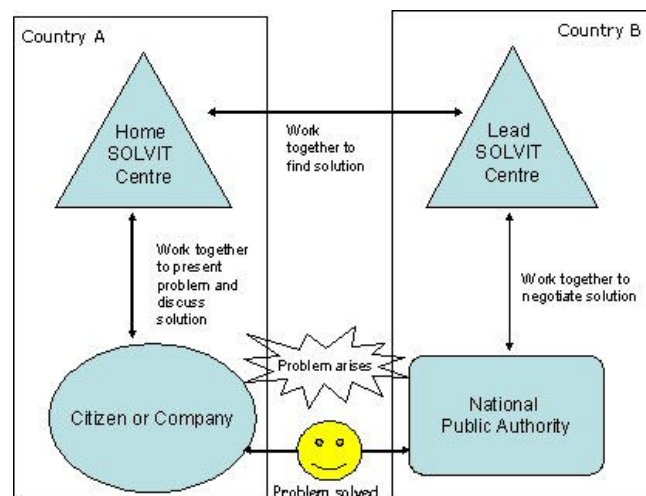
¹⁷⁷ Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004, L123/18.

¹⁷⁸ <http://europa.eu.int/solvit/>

SOLVIT has mostly dealt with so far concern recognition of professional qualifications and diplomas, access to education, residence permits, voting rights, social security, employment rights, driving licences, motor vehicle registration, border controls, market access for products, market access for services, establishment as self-employed, public procurement, taxation and free movement of capital or payments.

Figure 16. Operation of SOLVIT mechanism.

Source: <http://europa.eu.int/solvit/>



3.5. Disputes Between Individuals

3.5.1. Alternative Dispute Resolution in Civil and Commercial Matters

The European Council has repeatedly stressed the importance of alternative means of settling disputes, in particular in Vienna in December 1998 and then in Tampere in October 1999 at the meeting devoted to the creation of an area of freedom, security and justice within the European Union. Also at the Lisbon March 2000 European Council meeting, the Commission was asked to consider alternative dispute resolution systems. In the employment relations'

field, the Brussels European Council of December 2001 stressed the importance of voluntary mediation mechanism.¹⁷⁹

Alternative dispute resolution (ADR) is defined by the Commission as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration power.¹⁸⁰ Arbitration is closer to quasi-judicial procedure than to ADR as arbitrators' awards replace judicial decisions. A distinction is made by the Commission¹⁸¹ between ADR conducted by courts or entrusted by the court to a third party ('ADRs in the context of judicial proceedings') and ADRs used by the parties to a dispute through an out-of-court procedure ('Conventional ADRs'). A second distinction is made between the different conventional ADR procedures. In certain ADR procedures the third party responsible can be called upon to take a decision that is binding for one party (often the case with Ombudsmen) or make a recommendation to the parties which they are free to follow or not (as is the case with the Consumer Complaint Boards in Scandinavian countries).¹⁸² In other ADR procedures, the third party does not formally adopt a position on the possible means of resolving the dispute but simply help the parties come to an agreement.¹⁸³ A public opinion survey of 2004 reveals that 60 % of EU citizens are aware of the existence of alternative mechanisms of dispute settlement in this area.¹⁸⁴

3.5.2. Out-of-court Resolution of Consumer Disputes

Measures in the field of consumer protection have been undertaken within the framework of a program aimed at providing consumers with better access to justice.¹⁸⁵ Directive 98/27/EC on injunctions for the protection of consumer interests was adopted.¹⁸⁶ Under this Directive, the

¹⁷⁹ Presidency conclusions Vienna, Tampere, Lisbon and Brussels: <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

¹⁸⁰ Definition as given by the European Commission in its Green Paper on Alternative Dispute Resolution in Civil and Commercial law, COM(2002) 196 final.

¹⁸¹ Ibid.

¹⁸² These two ADRs are subject to Commission Recommendation 98/257/EC concerning the principles applicable to the bodies responsible for the extrajudicial resolution of consumer disputes, OJ 1998 L 115/31. This recommendation also covers arbitration.

¹⁸³ These procedures in the consumer field are subject to Commission Recommendation 2001/310/EC on the principles applicable to the extrajudicial bodies charged with consensual resolution of consumer disputes, OJ L 109/56.

¹⁸⁴ Special Eurobarometer 195/Wave 60.0 Field: September 2003, Publication: October 2004.

¹⁸⁵ See most recently the Commission Communication of 4 April 2001 on the widening of access of consumers to other dispute resolution systems, COM(2001)161.

¹⁸⁶ OJ 1998, L166/51.

Member States must enable independent public bodies and consumer organisations to bring actions for an injunction against certain commercial practices. The Commission has adopted two recommendations establishing the principles applicable to out-of-court procedures for the resolution of consumer disputes. The first recommendation, which was adopted in March 1998¹⁸⁷ relates to the procedures, which, no matter what they are called, lead to a resolution of the dispute through the active intervention of a third party that formally adopts a position with regard to a solution. This recommendation sets out the seven minimum principles for the establishment and operation of ADR facilities. It does not relate to the procedures often referred to as mediation procedures. A list has been published by the Commission of all the bodies in Member States that are responsible for out-of-court resolution of consumer disputes, which the Member States consider to be in line with the recommendation.¹⁸⁸ The second recommendation of April 2001¹⁸⁹ relates to procedures, which are limited to a simple attempt to bring the parties together to convince them to find a solution by common consent. The third party can however propose a solution informally. These recommendations have been accompanied by the publication of the European complaint form for consumers.¹⁹⁰ This form has been designed to 'guide' and orient consumers in formulating their claims. It contains multiple-choice lists of responses to help consumers indicate their problems and their claims, together with sufficient space for users to give additional details or describe particular circumstances not covered by the multiple-choice lists.

3.5.3 ECODIR

In the field of electronic commerce ADRs have received particular attention, in particular in the e-Europe Action Plan.¹⁹¹ This concerns the traditional alternative channels and Online Dispute Resolution, which can also be used to resolve disputes that are not related to e-commerce. An online ADR initiative that is supported by the Commission is ECODIR (Electronic Consumer Dispute Resolution Platform).¹⁹² The whole procedure consists of three phases: 1) the negotiation phase, 2) the mediation phase and 3) the recommendation phase.

¹⁸⁷ Commission Recommendation 98/257, supra note 182.

¹⁸⁸ http://europa.eu.int/comm/consumers/redress/out_of_court/database/index_en.htm

¹⁸⁹ Commission Recommendation 2001/310, supra note 183.

¹⁹⁰ http://europa.eu.int/comm/consumers/redress/compl/cons_compl/acce_just03_en.htm

¹⁹¹ http://europa.eu.int/information_society/eeurope/2005/all_about/action_plan/index_en.htm

¹⁹² <http://www.ecodir.org>

In the negotiation phase the First Party logs in and creates a new user account after having checked that the dispute comes within ECODIR dispute resolution rules. The First Party then fills out the online invitation to negotiate. Having filed the electronic invitation to negotiate form, the First Party receives a confirmation message from the Secretariat via email within the next 24 hours. The Second Party will receive the invitation to negotiate from the Secretariat and will be given seven days to respond. In the absence of a response, the Second Party is deemed to have refused to participate. If the Second Party responds, both Parties negotiate in an attempt to find a mutually acceptable solution to the dispute. Subsequently, in the absence of agreement, either party may request the assistance of a neutral third party, the Mediator (mediation phase). The Secretariat may appoint a Mediator selected from ECODIR's lists¹⁹³ or appoint the mediator chosen by the Parties. The Mediator then reviews the file and makes an attempt to bring the Parties to a settlement. The Mediator is proactive and can make settlement proposals. In the absence of agreement after 15 days from the beginning of the mediation phase, the Mediator makes a recommendation. Except where otherwise agreed, the Parties are not bound by this recommendation.

3.5.4. European Networks: the EEJ-net and the FIN-NET

In the field of consumer protection, the Commission has established two European networks of national bodies both aimed at facilitating access for consumers to out-of-court procedures for the resolution of cross-border disputes. The European Extra-Judicial Network (EEJ-net)¹⁹⁴ is a consumer support and information structure, which consists of national contact points. Each of the contact points relays information to the 400 bodies that the MS considered to have fulfilled the requirements of the two Commission recommendations. The FIN-NET (Financial Services Complaint Network)¹⁹⁵ is a network of the competent national ADR bodies, which meet the requirements of the first Commission recommendation. This network provides consumers who have problems related to financial services (banks, insurance companies etc.) with direct access to an ADR facility.

¹⁹³ http://www.ecodir.org/about_us/mediators.htm

¹⁹⁴ <http://www.eejnet.org/>

¹⁹⁵ http://europa.eu.int/comm/internal_market/finservices-retail/finnet/index_en.htm

4. Prevention of Disputes

In addition to providing formal and informal ways of settling disputes the EU has also built in mechanisms to prevent disputes from arising. Several important legislative provisions can be mentioned in this context.

4.1. The Duty to Co-operate

First, and this goes to the very basis of the Community's legal order, the EC Treaty imposes on the Member States a duty to co-operate and is also called the solidarity obligation. Article 10 of the EC Treaty thus requires that Member States take all appropriate measures to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. Moreover, they must facilitate the achievement of the Community's tasks, whilst they need to abstain from any measure, which could jeopardise the attainment of the objectives of this Treaty.

4.2. The Duty to Notify Draft Standards and Technical Rules

A second important instrument relates to the Community's objective of free trade. To prevent the creation of the barriers to the free movement of goods that can arise from the adoption of different national technical regulations, two information procedures have been set up, which allows the Commission to learn about the legislative activities that are planned within the Member States.¹⁹⁶ These procedures thus aim to reinforce mutual recognition, and at the same time aim to prevent the arising of conflicts due to the creation of unjustified trade barriers.¹⁹⁷ The first is the information procedure for standards. Each national standardisation body informs the Commission and all the other European and national standardisation bodies specified in the Annexes to the Directive of its draft standards or amendments to existing

¹⁹⁶ Directive 98/34/EC of the Parliament and the Council laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998, L 204/37 and (following Directive 98/48/EC, OJ 1998, L217/18) regulations on information society services.

¹⁹⁷ See also Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community, OJ 1995, L 321/1.

standards. The Commission may also request that it be informed of national standardisation programmes, which will then be made available to the other Member States. The Commission and the other standardisation bodies may comment on draft standards, in which case they will be informed of the follow-up.

The second and most important one is the information procedure for technical rules. Every Member State must notify the Commission of its draft technical rules or amendment of technical regulations, the grounds for them and, where necessary, the main basic legislative and regulatory provisions of the draft regulation. The Commission will inform all the other Member States of the draft notified. Their comments will be taken into account, where possible, in the final version of the technical regulation. In order to allow the Commission and other Member States to react, the Member States must refrain from adopting any draft technical regulations for three months from the date of receipt by the Commission. If the Commission wishes to propose or adopt a legislative act in the same area or if the draft concerns a subject already covered by a Commission proposal, the Member State concerned must suspend adoption of the draft for 12 months. If the Council adopts a common position during this period, the standstill period will be extended by six months. The notification procedure does not apply to technical regulations that are an integral transposition of an international or European standard, nor to national regulations on Community technical specifications or to other provisions of Community law.¹⁹⁸

This notification system functions as an ‘early warning’ system and institutes dynamic co-operation between the national and Community authorities. It envisages a kind of ‘learning process’: by means of the information exchange, both the Commission and other national authorities can learn of national activities in advance of their adoption to verify their compatibility with the free movement of goods provision, whilst on the other hand national initiatives may serve as a potential basis for introduction of regulatory standards at Community level. Hence the system not only offers an intense framework of co-operation to improve the process of internal market building, but also could serve as a source of innovation

¹⁹⁸ For statistics on how many technical regulations were notified in 2003 and in what field: http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/c_216/c_21620040828en00020004.pdf

through sharing and learning.¹⁹⁹ In this way, the system has been described as a device of ‘co-operative federalism’.²⁰⁰

Although it is true that over time Member States have become more active in notifying, this is not to say that they have been very enthusiastic about the EU disciplining their regulatory activities. It has indeed occurred regularly that Member States did not notify all their draft legislations or that they invoked the urgency exception after the adoption of the legislation in question. Faced with this practice, the Commission has decided for instance to remedy this gap by contracting an external organisation to detect national regulations which have been adopted in breach of the Directive.²⁰¹ Over the years the Commission has not grown tired of repeating the need for stricter supervision of the notification requirement and its intention to initiate as a matter of course the Article 226 procedure where a failure to notify was identified.²⁰² Case-law by the ECJ has offered the Commission a helping hand. In the early 1990s cases concerning Italian, German and Dutch instances of non-notification, the ECJ confirmed that non-notification is an infringement of Community law, giving thus the procedure considerable more weight.²⁰³ In 1996, the ECJ went even further and declared that the failure to notify national laws under the Information Directive meant that such laws are unenforceable.²⁰⁴

4.3. Administrative Co-operation

In November 1999, the Commission observed that the Member States had made progress in transposing directives relating to the internal market. The percentage of directives not yet transposed in one or more Member States fell by half within two years and is now around the 12% mark. The non-transposal rate for each Member State also dropped significantly: only five Member States still have a rate more than 5%. In its communication of 1999,²⁰⁵ the

¹⁹⁹ S. Weatherill, ‘Safeguarding the Acquis Communautaire’, T. Heukels, N. Blok and M. Brus (eds), *The European Union after Amsterdam*, (The Hague, Kluwer 1998), 153-178.

²⁰⁰ R. Dehousse, 1992 and Beyond: The Institutional Dimension of the Internal Market Programme, (1989) 16 *Legal Issues of European Integration*, 109-136.

²⁰¹ COM (96) 286 final, 27.

²⁰² For instance, 12th Annual Report, (1995) OJ 1995, C 254, 16.

²⁰³ See e.g. Case C-226/97 *Criminal proceedings against Johannes Martinus Lemmens* [1998] ECR I-3711 and Case C-443/98 *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535.

²⁰⁴ Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201.

²⁰⁵ Communication from the Commission to the European Parliament and the Council - The Strategy for Europe’s Internal Market, COM(1999)624 final, 24 November 1999.

Commission presented its 'Strategy for the internal market' which set out its strategic aims for the next five years (2000-2004): to improve the quality of life of European citizens, to enhance the efficiency of Community product and capital markets, to improve the business environment, and to exploit the achievements of the Internal Market in a changing world. A series of operational objectives has also been defined, with each covering a particular policy dimension that contributes to the achievement of one or more strategic objectives. In order to achieve these operational objectives, short-term priorities are identified as 'target actions'. The target actions to improve the effectiveness of the legal framework include steps by the Member States to reduce their rate of non-transposal to less than 1.5% by the end of 2000, and the launch of a pilot project offering Community support for national initiatives in the field of administrative cooperation. This pilot project takes over from the KAROLUS programme for the exchange of officials, which expired at the end of 1999. The latter programme provided for an exchange of national officials engaged in the implementation of Community legislation on the internal market.²⁰⁶

5. Concluding Remarks

This chapter has analysed the main legislative provisions and practice of both the judicial and some alternative dispute settlement systems in the European Union. We have observed that there are various possibilities to review the legality of measures that are issued by the Community institutions: i.e. direct action (Article 230) and indirect action through the preliminary reference procedure of Article 234. In the last few years, the future of the European judicial architecture has been hotly debated. The Treaty of Nice introduced some significant changes. The problems due to enlargement (carrying with it also the linguistic problem) and the delay and the increasing caseload of the courts are still in need to be addressed. Some provisions of reform have been introduced by the Nice Treaty and will be introduced by the new Constitution. Other avenues of reform of the European judicial architecture, in particular relating to the preliminary reference procedure are currently being discussed. When studying dispute settlement in the European Union, account should be taken also of the alternative dispute settlement mechanisms that over the years have been developed

²⁰⁶ Decision 92/481/EEC on the adoption of an action plan for the exchange between Member State administrations of national officials who are engaged in the implementation of Community legislation required

by the European Union. This article has shown that several fora have been set up that serve as problem-solving platforms between the Member States and the Community institutions, as well as aiming at the prevention of conflicts. At the same time, the Community institutions have also been actively promoting friendly settlements of conflicts between individuals (producers/traders) and Member States as well as for individuals amongst themselves (business and consumers).

In conclusion it is submitted that the current EU model of dispute settlement does not offer ideal solutions but could serve as a learning process for other integration processes such as the Andean Community and the recently created South American Community of Nations.

to achieve the internal market, OJ 1992, L286/65, as amended by Decision 889/98/EC (Karolus programme), OJ 1998, L126/6.

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